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IN THE

Supreme Court of the United States

October Term, 1963.

No. 342

FEDERAL DEPOSIT INSURANCE CORPORATION, TO THE USE OF SECRETARY OF BANKING, RECEIVER OF INTEGRITY TRUST COMPANY, TO THE USE OF BUTCHER & SHERRERD, AND FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE,

Appellees,

v.

HARRY J. ALKER, JR. AND MAMIE DuBAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DuBAN, DECEASED,

Petitioners-Appellants.

PETITION FOR ALLOWANCE OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX.

JAMES J. REGAN, JR.,
1505 Land Title Building,
Philadelphia 10, Pa.,
ROBERT M. TAYLOR,
2215 Land Title Building,
Philadelphia 10, Pa.,
Attorneys for Petitioner Alker.

International, 711 So. 50th St., Phila. 43, Pa.

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HARRY J. ALKER, JR. AND MAMIE DuBAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DuBAN, DECEASED,

Petitioners-Appellants.

PETITION FOR ALLOWANCE OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Harry J. Alker, Jr., prays your Honorable Court for allowance of a Writ of Certiorari to review the order and judgment of the United States Court of Appeals for the Third Circuit, entered March 27, 1963, affirming the Order of July 12, 1962, of the United States District Court for the Eastern District of Pennsylvania; and in support thereof, submits the following data and argument:

OPINIONS BELOW.

The Opinion of the Court of Appeals for the Third Circuit, filed March 27, 1963, is not as yet reported. A copy of same is contained in the Appendix herein at page 50a.

Copies of the District Court's Opinion of June 20, 1962, and Memorandum Opinion of July 12, 1962, respectively, are contained on pages 15a-22a and 23a-24a in the Appendix to Petitioners' Appellants' Brief and Appendix.

JURISDICTION.

The judgment of the learned Court of Appeals was entered March 27, 1963. A petition for rehearing was allowed to be filed by the Court and then denied by the Court on May 8, 1963.

The statutory provision conferring jurisdiction on this Honorable Supreme Court of the United States to review said judgment and decision by Certiorari is that invoked under Section 1254 of the United States Judiciary Code, 28 U. S. C. A. Section 1254.

QUESTIONS PRESENTED FOR REVIEW.

1. Did the Lower Appellate Court misinterpret, misconstrue or mis-apply Federal Civil Rule of Procedure 60(b)?

2. Did the Lower Appellate Court, misinterpret, misconstrue or mis apply this Honorable Court's opinion in the case of Federal Deposit Insurance Corporation v. D'Oench Duhme Co., 315 U. S. 447?

3. Does a District Court Trial Judge sitting as a Chancellor in Equity have the right to grant Petitioner a new trial, to reach justice and equity, without obtaining permission from the respective Court of Appeals, to whom the matter has been appealed?

4. Were the Petitioner's constitutional rights violated by the Court of Appeals ordering a Judge other than Judge Welsh (the Trial Chancellor in the case) to hear argument on his Motion for a New Trial?

5. Have the Lower Courts misinterpreted the law of contracts and their duty to ascertain the definiteness of a contract when it may reasonably be ascertained from the facts on hand and the circumstances of the matter?

6. (a) Could Judge Layton, a District Judge of co-ordinate jurisdiction sitting in the same court and in the same case, and upon the same facts, overrule the prior decision of Judge Welsh?

(b) Should Judge Layton have sat at all in the case when Judge Welsh was available?

STATEMENT OF THE CASE.

This action was initially begun by the filing of a Complaint *in Equity* asking for a deficiency judgment against petitioner, and to compel the National Dairy Products Corporation to transfer to plaintiff certain National Dairy Shares of stock belonging to the Estate of Alfred A. DuBan, Deceased, pledged with said Alker note as collateral security. The Federal Deposit Insurance Corporation claimed that *it* had acquired the note and the collateral as a holder in due course and when there was no default had attempted to illegally terminate the Alker-DuBan agreement. It subsequently developed, long afterwards, that the Federal Deposit Insurance Corporation misrepresented the facts to the trial judge and a judgment was entered without all the facts being presented to the Court. This instant proceeding was an application for new trial to present to the Court misrepresentation by the Federal Deposit Insurance Corporation and additional testimony of witnesses, one of whom had not been allowed to testify at the trial by the Court, and other witnesses who had not been available at the time of trial and additional testimony of some witnesses who had been there and had gotten additional information.

In October, 1929, Harry J. Alker, Jr., a then practicing attorney at law in Philadelphia and Montgomery County, Pennsylvania, had a large broker's loan, secured by marketable collateral. The Integrity Trust Company, a corporation organized and existing under laws of the State of Pennsylvania, and whose deposits were insured by the Federal Deposit Insurance Corporation, took the loan over from the broker. Two demand notes totalling $592,150.00 were given by Alker to the Integrity Trust Company ($350,000.00 and $242,150.00) at its request on or about May 26, 1931, in order that the Integrity Trust Company could use one of these notes together with its pledged collateral in obtaining a loan or advance from the Fidelity

Trust Company of Philadelphia. Later this loan or advance was paid off by Integrity, and the Alker note and collateral were returned by the Fidelity to the Integrity Trust Company.

Prior to September, 1931, the collateral held by the Integrity as security for the loan included 3,400 shares of common stock of National Dairy Products Company owned by Alfred A. DuBan who had loaned them to Alker so that he might employ them as security, as well as other collateral.

By September, 1931, Alker's collateral had become worth less than the required amount and the Integrity desired additional collateral, and so informed Alker. In response thereto, Alker approached his friend, Alfred A. DuBan, for aid. Mr. DuBan was a high official of the National Dairy Products Company, as well as being a large stockholder thereof. He also had private offices in the Land Title Building in Philadelphia, wherein Mr. Alker's law offices were situated.

At approximately the same time in September, 1931, Mr. William F. Fischer, a large manufacturer of machinery in Philadelphia, and also a director of the Integrity Trust Company and a member of its executive committee, was, as such bank official, directed by the Integrity to take up with Mr. Alker the matter of his notes and the obtaining of additional collateral thereon for the protection of the bank.

In pursuance of these purposes, Mr. Fischer and Mr. Alker met in the offices of the Integrity Trust Company, located at 16th and Walnut Streets, Philadelphia. There Mr. Fischer went over his loan matter with Mr. Alker and Mr. Hardt, its President, and Mr. Hardt asked him for additional collateral. Mr. Alker then apprised him that he could probably secure additional collateral consisting of 1000 shares of National Dairy stock belonging to Mr. DuBan upon certain conditions. Mr. Fischer and Mr. Alker then went to Mr. DuBan's office and met with him there.

Mr. DuBan, then and there, stated to Mr. Fischer, in the presence of Mr. Alker, that he would deposit 1000 shares

of National Dairy Stock with the Integrity Trust Company as additional collateral for Mr. Alker's loan, providing Mr. Alker's account would not be disturbed, because, otherwise, there would be no end to putting up additional collateral.

Mr. DuBan, then, on September 29, 1931, signed the assignments of the said 1000 shares of National Dairy stock which were witnessed by Mr. Fischer, for the bank's use, subject to such conditions and agreement, and delivered same to Mr. Fischer.

Mr. Fischer and Mr. Alker then returned to the Integrity's offices and went to Mr. Walter K. Hardt's office, he being the President of the Integrity Trust Company. Before they saw Mr. Hardt, however, they explained the matter to Mr. William G. Semisch, the Vice-President of Integrity in charge of loans and collateral. After hearing them, Mr. Semisch told them they would have to see Mr. Hardt about it. They then went over the entire matter with Mr. Hardt. As a result thereof, Mr. Hardt, for the Integrity, agreed to go along with such arrangement that the Integrity would not disturb the Alker loan provided Mr. DuBan deposited the 1000 shares of National Dairy and Alker put up life insurance in the amount of $100,000.00, assigned certain legal fees and other fees due him from the Commonwealth of Pennsylvania, and paid the interest on the loan, and premiums on the life insurance regularly. This was agreed to by Alker and DuBan; Alker executed the assignment of his fees in favor of the Integrity. The bank placed at that time a life insurance policy for a term of five years. The Integrity believed at that time that it would take five years within which to work out the situation, and fixed the time limit for forbearance at five years and so placed the term policy for five years, extending the loan for five years.

Mr. DuBan and Mr. Alker agreed to all such arrangements and conditions.

The DuBan National Dairy stock was delivered to the Integrity, by Mr. DuBan through Mr. Fischer and accepted

by it. Mr. Alker regularly paid the loan interest and insurance premiums.

The Integrity Trust Company did not again call for additional collateral by Mr. Alker, nor did it attempt to sell his notes or collateral.

It is to be noted that the Court of Appeals for the Third Circuit, in its opinion on appeal of this case (151 F. 2d 907) assumed that the officers of the Integrity Trust Company agreed that, if Mr. DuBan would put up 1000 more shares of National Dairy stock as additional security for the loan and Alker continued to pay the interest thereon, assigned certain insurance policies to the Trust Company and certain fees due him from the Commonwealth of Pennsylvania, the Trust Company would not disturb the loan or the collateral until security values had risen to such a point that Alker could recover his "equity", that there was a valid oral contract to this effect and Alker and DuBan did everything required of them by this contract.

Mr. Hardt testified and deposed that when he met with Mr. Alker and Mr. Fischer, he assured them that, speaking personally and as President of the Integrity Trust Company, the bank's attitude was one of complete cooperation and they would do everything reasonable within their power to make it possible for him to liquidate the loan ultimately at his convenience and, at such a time as might cause him the least embarrassment, and that the DuBan-Alker collateral was delivered to Mr. Semisch by Mr. Fischer, who turned it over to Mr. Antrim.

The said agreement was approved by the executive committee of the Integrity Trust Company of which Mr. William P. Gest was a member. He was also President of the Fidelity Trust Company (which company is one of the use-plaintiffs herein).

In December, 1936, Mr. Alker was called on the telephone by Mr. Hardt, who told him that the bank examiner had been there or was there, and, as Mr. Alker's notes were

five years old, he wanted a new note executed; that as a result thereof, Alker visited Mr. Hardt and spoke to him about the note and again discussed their agreement. Mr. Alker was told by Mr. Hardt that he would put on the new note such phraseology that there would be no question as to the agreement between DuBan, Alker, and the Integrity.

Mr. Alker then executed a new demand note prepared by the Integrity, dated December 11, 1936, in the amount of $592,150.00, which contained among other wording, the following phraseology: "this note is given in substitution and continuance of my demand notes in the original amount of $350,000, dated May 26, 1931, and $242,150, reduced by payments on account to $214,367.51, dated May 26, 1931; other collateral forwarded." The collateral was transferred to it.

The old notes were returned to Alker's messenger, John M. Pellini, by the Integrity to Alker some time in January, 1937, but were not available at the trial of this case.

It was also at this time the five-year term life insurance policy on Mr. Alker's life was expiring, and, as the depression still existed, it was agreed by all the parties concerned that the time of forbearance should and must be extended. The Integrity Trust Company determined it would take ten years more to still work out the situation, so a new ten-year term policy was placed and the loan moratorium and extension agreement were extended for ten more years. The Integrity, by Mr. Semisch, its Vice-President, arranged this insurance through Mr. L. J. Santamarie, an insurance broker and expert, advising Mr. Santamarie it was extending the loan 10 years, and the new policy must be for ten years.

On November 12, 1938, Mr. DuBan died, and letters testamentary were granted to the defendant Mamie DuBan as Executrix.

During all this time, Mr. Alker kept up all his payments of interest and insurance premiums, turned over the

assigned fees as received, and abided by all the terms of the agreement, as did the Integrity Trust Company and its officers.

On or about January 2, 1940, the Federal Deposit Insurance Corporation and The Philadelphia National Bank, Corn Exchange National Bank & Trust Company, First National Bank, Central-Penn National Bank of Philadelphia, Tradesmens National Bank and Trust Company, Market Street Bank, The Pennsylvania Company for Insurances on Lives and Granting Annuities, Fidelity-Philadelphia Trust Company, Girard Trust Company, Drexel & Company, Land Title Bank and Trust Company, Provident Trust Company, and the Integrity Trust Company, all banking institutions under the laws of the Commonwealth of Pennsylvania, executed an agreement that stated whereas Integrity is an "insured bank" as defined in section 12-B of the Federal Reserve Act, as amended, and not being in satisfactory condition to continue in business as an operating bank, was about to apply or had applied to F. D. I. C. for a loan to facilitate the sale of certain of its assets and assumption of its liabilities to its depositors by the First National Bank of Philadelphia and Western Saving Fund Society under the provisions of paragraph 4 of subsection (r) of such section 12-B and that F. D. I. C. had indicated its willingness to make a loan of $21,000,000 for such purpose and on certain conditions.

The said agreement provided that the said associated banks assigned, transferred and set over unto F. D. I. C. their individual, conditioned deposits with the Integrity Trust Company, the Integrity being at that time indebted to the said associated banks deposit liabilities in the aggregate of $9,000,000 subjected to certain restrictions as to payment to the associated banks.

Certain provisions are contained in said agreement providing for F. D. I. C. to liquidate the Integrity's collateral, including that turned over by the associated banks, and

then apply the proceeds according to its plan of agreement, repaying the associated banks.

A copy of said agreement is attached hereto as an exhibit. It is to be noted that the associated banks' assignments were free of any offset, counter-claim, or reduction of any kind or character (Appendix 25a-35a).

On January 13, 1940, the Federal Deposit Insurance Corporation made a loan of $21,000,000 to the Integrity Trust Company, carrying out the terms of the agreement of January 2, 1940, and, in turn, the Integrity pledged and assigned the Alker note and his collateral, together with all the rest of its banking assets, with certain immaterial exceptions, as security for said loan.

The appellants had no knowledge of this agreement, loan and assignment before the trial of the case and during the trial of the case. It was not for many years later discovered when the F. D. I. C. made a public announcement in the newspapers that the state institutions had been paid back by the F. D. I. C. as liquidating agent all the money that was due them by the Integrity Trust Company (59a).

The Integrity Trust Company immediately thereupon and thereafter January 13, 1940, ceased to do business as a banking institution and the Secretary of Banking became its Receiver in accordance with the laws of Pennsylvania.

On February 22, 1940, the chief supervisor of the F. D. I. C. wrote to Alker requesting a conference, stating that he understood there was an oral agreement concerning the loan. The conference was held and Alker stated to the Supervisor the terms of the oral contract as he understood them. Following this conference, Alker continued to pay the interest on his loan and the insurance premiums and F. D. I. C. did not call the loan.

Thereafter, a representative of F. D. I. C. also had a conference with Alker respecting Alker's loan, Fischer being present. They fully informed him of every circumstance surrounding the loan.

After the said interviews with Alker, and Fischer and Alker and with knowledge of said agreement relating to said loan, F. D. I. C. continued to accept Alker's interest, certain of the assigned fees, and the benefit of the insurance for over two years, never during that time either questioning or intimating an intention of repudiating the agreement. In 1943, F. D. I. C. as liquidator, suddenly arbitrarily repudiated the agreement, and sold to itself all the collateral with the loan at a purported "private sale" although it used the modus operandi of a public sale. Having attempted to do such, and not having done it properly, such sale should be rescinded. Since the sale, the securities have appreciated tremendously, and had they been held as agreed the loan would have been paid in full and the excess collateral would have been returned to the respective parties.

In 1942 F. D. I. C. endeavored to have the DuBan share of National Dairy stock transferred to it. Alker, and Mrs. DuBan as Executrix, protested. Alker advised National Dairy that the proposed transfer was in breach of the oral contract, and National Dairy at first refused to transfer the stocks. Later, the shares were registered in the name of F. D. I. C. as pledgee. Thereafter, F. D. I. C. demanded payment of the loan. On January 20, 1943, payment not having been made, F. D. I. C. sold the collateral, including the National Dairy stock, at private sale to itself for the sum of $358,336.50.

The present equity proceeding was then instituted by the F. D. I. C. after the sale to establish a deficiency against Alker, and to compel the National Dairy Products Corporation to transfer the DuBan stock standing in DuBan's name to Federal Deposit Insurance Company.

The trial of the case, before Judge Welsh, began April 12, 1944, and ending May 3, 1944.

At the trial the F. D. I. C. took the position it was not bound by the agreement with the trust company: that it was a holder in due course of Alker's note, and an alleged lender

without notice; this in spite of the fact that it had accepted the interest and checked the insurance status since 1940, after knowledge of the agreement.

The F. D. I. C. admitted at the trial there had been no default by Alker in the payment of interest or the maintenance of the insurance or the payment of the assigned fees as received.

At no time during the trial did the F. D. I. C. reveal to the Chancellor the fact that it had executed the said agreement of January 2, 1940, with the associated banks, and that it was acting as liquidating agent, not only for itself, but for the twelve associated state banks. Neither did it produce copies of the bank examiner's (Matsinger) reports of his yearly examinations which referred to the Alker-DuBan-Integrity agreement, nor did it call upon Mr. Matsinger, although it knew of him and of his connection with the case. These omissions being performed, despite of and even after the Chancellor, Judge Welsh, announced at the beginning of the second day of the trial, in Court, while Mr. Semisch was on the witness stand, "We can't hurry this case. There are too many factors in this case of great importance, and I want you both to feel you are settled down and *will show me everything*. I want to know everything about this case, gentlemen. I am sitting here as a Court and Jury, and there are things that I want to know fully about the loan" (N. T. 138a and 194a).

At the trial, Judge Welsh refused to hear the testimony of Louis J. Santamarie, the insurance agent, who arranged Alker's life insurance for the Integrity under directions from Mr. Semisch, which said insurance agent was prepared to testify that in the fall of 1936 he saw Mr. Semisch for the purpose of placing a policy of life insurance in connection with a loan of Harry J. Alker, Jr. That Semisch, who was the executive officer of the Integrity in charge of loans, told him he was interested in procuring an insurance policy that would cover the loan, which would run for a minimum period of ten years, because of the fact that Alker

had a loan that would run that time unless it was paid off sooner; that he recommended a form YRT policy for $100,000 for a term of ten years, which he turned over to Mr. Semisch. The Court, without this testimony (which would have clarified the situation), decided the agreement was too indefinite as to time of performance.

The Chancellor found as a fact there was no fraud committed pertaining to the Alker loan by any one.

Judge Welsh, in his opinion dated October 6, 1944, found, inter alia, "* * * it may be conceded that as a result of the conversation described, there was a satisfactory understanding that the loan and collateral would not be "disturbed", as alleged by the defendant, and that the defendant thereby received the desired assurance that he would not soon be faced with a summary demand for payment or additional collateral. Even if the language could be construed to mean that the bank bound itself not to exercise its rights under the terms of the note, the agreement lacks essential definiteness and certainty—certainty as to proof and certainty as to the time of performance, that is, the limit of restraint."

The Chancellor further found that the plaintiff, F. D. I. C., was entitled to recover the unpaid balance of the collateral note amounting to $108,236.89, and ordered and decreed that the National Dairy Products Corporation transfer on its books 4400 shares of the capital stock of said company, registered in the name of Alfred A. DuBan and Federal Deposit Insurance Corporation, as pledgees, to the Federal Deposit Insurance Corporation as owner thereof. On November 8, 1944, judgment was so entered.

On June 9, 1949, after the associated banks had been paid all their proceeds which F. D. I. C. had collected for them, the judgment was marked to the use of the Secretary of Banking of the Commonwealth of Pennsylvania, as Receiver of the Integrity Trust Company. Subsequently the judgment was marked to the use of Butcher & Sherrerd and Fidelity-Philadelphia Trust Company, Trustee, to whom

the judgment had been assigned in the final accounting of the Secretary of Banking as Receiver for the Integrity Trust Company.

The appellants filed a motion for a new trial on October 23, 1944, which was denied by Judge Welsh on November 30, 1944. The defendants appealed from the District Court's order and judgment to the Court of Appeals for the Third Circuit. Said Appellate Court affirmed the District Court's judgment on November 7, 1945, and that after numerous subsequent motions and other applications by the defendants to the District Court, the Court of Appeals and the Supreme Court, the said Court of Appeals, on June 14, 1955, gave the District Court leave to consider another motion by the defendants for a new trial. Such motion was filed on June 16, 1955. An answer was filed by the use-plaintiffs on September 7, 1955. The motion was argued to Judge Welsh in the District Court on October 17, 1955, and was granted by him on November 3, 1955 (App. 1a).

The use-plaintiffs thereupon took an appeal which the defendants moved to dismiss. Subsequently the use-plaintiffs petitioned the Court of Appeals for writs of mandamus and prohibition, directing Judge Welsh to vacate his order granting a new trial and prohibiting him from proceeding with such a trial. Judge Welsh filed an answer, as did Alker, who was permitted to intervene by the Court.

The Court of Appeals, Judges Hastie, Staley, and Maris, sitting, found (234 F. 2d 113), that Judge Welsh did not hold a hearing as directed by said Court in its order of June 14, 1955, nor did he make necessary findings or conclusions, that on the contrary he granted a new trial solely on the allegations of the defendant's motion which were unsupported by evidence and were controverted by the use-plaintiff's Answer; that in this granting a new trial without making the necessary findings and conclusions based on evidence produced at a hearing, Judge Welsh exceeded his authority under Rule 60(b). Moreover, he failed to follow the express direction of this Court that he should

also decide the jurisdictional question, that is, whether the motion was one which Rule 60(b) empowered him to grant.

Accordingly, the Court of Appeals issued a writ of mandamus directing Judge Welsh to vacate the order which he entered in the District Court on November 3, 1955, granting the defendant's motion for a new trial and thereupon to reconsider and dispose of that motion in a manner not inconsistent with its opinion, and, in view of the issuance of the writ of mandamus the appeal of the use-plaintiffs from the order in question was dismissed.

On November 22, 1961, upon consideration of the motion of Harry J. Alker, Jr., dated November 15, 1961, to reopen the case and place his motion for a new trial in this action (243 F. 2d 113) on the argument list; together with a petition to take depositions of witnesses in support thereof whose testimony was not already in the record, it was ordered, adjudged and decreed by President Judge Thomas J. Clary that said motion to reopen the case and place upon the argument list his motion for a new trial be and it is hereby granted; depositions of any witnesses whose testimony is not already in the record to be taken and completed on or before January 15, 1962, and the motion thereafter to be promptly listed for argument upon special application to the Honorable Caleb B. Layton, III, United States District Judge of Delaware, specially assigned to hear and dispose of said motion.

The following order was filed with the Clerk of the Court by the Honorable Judge Caleb R. Layton, III, specially assigned, on January 18, 1962, to wit:

> "And Now, to wit, this 17th day of January, 1962, upon motion of Robert M. Taylor, Esquire, attorney for Harry J. Alker, Jr., one of the defendants named in the above entitled matter, and after hearing, and over objection of counsel for plaintiffs, the order of Chief Judge Clary, dated November 22, 1961, ordering that depositions of any witnesses whose testimony is not already in the record to be taken and completed on or

before January 15, 1962, is hereby amended to extend the time of preparing and filing of such depositions, to February 1, 1962. It is further ordered that said defendant's brief for the argument of this matter shall be filed not later than February 20, 1962; and the plaintiff's brief shall be filed not later than March 20, 1962; and that date of argument shall be March 26, 1962."

The deposition of John Pellini, who had not testified in court, was taken and filed with the Clerk of the District Court on February 1, 1962.

The depositions of Louis J. Santamarie were taken on December 13 and 20, 1946; and the depositions of John A. Barone and Charles D. MacAvoy were taken on December 20. The depositions of Charles B. Matsinger and John Pellini were taken on January 16, 1947. All of the said depositions named in this paragraph were first filed with the Court of Appeals and recently were filed with the District Court under Civil Action No. 3047.

The trial court found, as stated, against the defendants because of alleged indefiniteness of time in the contract. This, however, was later corrected by witnesses who were finally located, and whose existence was not known before. At the time of trial Alker was in the hospital and had himself brought to the trial by nurses. He was very ill before the trial and during the trial which seriously affected the preparation of his defense and the trial of his case. His office manager, John Pellini, who handled his loan and note matters was serving in the United States Army in Europe. The witness, Louis J. Santamarie, the insurance agent who placed Alker's ten-year term insurance policy upon the information, orders and instructions of the Integrity's Vice-President Semisch, was at the trial, but was not allowed to testify by Judge Welsh. His testimony would certainly have cleared up the time element in the case and defendant contends this action by the trial court was a reversible error. John Pellini's testimony would have also explained

the time element as well as indicating who handled Mr. Alker's old notes and new note and the dates the various phrasing was put upon them.

Argument was then heard on appellants-defendants' Motion For a New Trial under Federal Rule 60(b) and other reasons, before the Honorable Caleb Layton, III, District Court Judge. On June 19, 1962, the said trial Judge filed his opinion denying the said motion. A copy of said opinion is contained in the appendix (15a).

Immediately thereafter the appellants-defendants filed a Motion for Reargument. Said Motion was denied by the Trial Judge in a memorandum opinion filed July 11, 1962 (23a).

Wherefore appellants filed a timely appeal to the Court of Appeals for the Third Circuit asking for a hearing thereon.

On March 7, 1963, the said Court of Appeals heard petitioner's appeal and on March 27, 1963, filed its opinion affirming the District Court's findings. Said opinion of the court stated: "Per curiam on review of the record we find no error. The District Court's denial of appellants' motion for a new trial will be affirmed for the reasons so well stated by Judge Layton in his opinion filed June 20, 1962, and his memorandum opinion filed July 12, 1962." Petitioner filed a petition for Re-hearing which was denied by the Court of Appeals on May 8, 1963, hence this petition for allowance of a writ of certiorari.

On July 28, 1948, the Federal Deposit Insurance Corporation presented a motion for leave to substitute the Secretary of Banking, Commonwealth of Pennsylvania, Receiver of Integrity Trust Company, as party plaintiff on the ground that F. D. I. C. had received full payment of its loan to Integrity Trust Company. Alker opposed this motion, and subsequently filed a renewal of the motion for new trial. On March 3, 1949, the trial judge granted the motion for new trial and denied the motion to substitute the Secretary of Banking for F. D. I. C. as party plaintiff. The F. D. I. C.

thereupon applied to the Appellate Court for writs of mandamus and prohibition against the order of March 3, 1949. On May 9, 1949, an order granting new trial was vacated and an order substituting the Secretary of Banking as party plaintiff was granted. Alker appealed from both of these orders, the Appellate Court on September 7, 1950, sustaining the order vacating the motion for new trial but reversing the order substituting the Secretary of Banking as party plaintiff. On September 7, 1950, the judgment against Alker was marked to the use of Secretary of Banking, Commonwealth of Pennsylvania, Receiver of Integrity Trust Company.

ORDER.

(Filed March 3, 1949.)

AND NOW, to wit, this 3rd day of March, A. D. 1949, having heard the argument, considered the briefs submitted by the parties and examined the entire record in the case to date, it is ORDERED, ADJUDGED, and DECREED that defendant's motion for a new trial be and the same is hereby granted.

It is further ORDERED, ADJUDGED, and DECREED that plaintiff's motion to substitute the Secretary of Banking, Commonwealth of Pennsylvania, Receiver of Integrity Trust Company, as party plaintiff for Federal Deposit Insurance Corporation be and the same is hereby denied.

GEO. A. WELSH,
Judge.

(See *Sec'y of Banking of Penna. v. Alker*, 183 F. 2d 431 (10015).)

As it is seen therefore, the F. D. I. C. is still the responsible party herein and petitioner submits it must still account to him for his collateral. As to Butcher-Sherrerd it picked up, for so many cents on the dollar, various claims against the Integrity.

Reference is made to Chief Judge Clary's order of November 22, 1961, wherein he ordered, ". . . depositions of any witnesses whose testimony is not already in the record to be taken and completed on or before January 15, 1962, . . ."

It was the petitioner's and his counsel's understanding and interpretation of this order that none of the witnesses who had testified at the trial or who had previously given depositions in the matter could not testify and give any further testimony at the new hearing.

It is petitioner's contention that he should have been permitted to have depositions taken of these and previous witnesses as to any new facts he had not testified to before.

It is to be noted that after the F. D. I. C. made its loan to the Integrity Trust Company and took over Alker's obligation and collateral on his loan, Alker for over a period of two years regularly made his payments of interest to the F. D. I. C., and paid the premiums regularly on his life insurance policies; and the F. D. I. C. recognized this agreement made by Alker and DuBan, receiving from Alker the interest regularly and having produced to it evidence of payment of the insurance premiums. These payments of interest were even paid by Alker and accepted by F. D. I. C. Alker also tendered payments of interest after this time for years, but it was refused by F. D. I. C.

REASONS FOR ALLOWANCE OF THE WRIT.

There are several questions of great importance raised in this case that will have immediate importance far beyond the particular facts and parties involved herein, and it is therefore vital that these questions involved should be decided finally by this Honorable Supreme Court. Some of these questions include whether this matter should be controlled by the general rules of equity and justice, the action having been an equity action, (1) the misapplication or misconstruing or misinterpretation of Federal Rule of Civil Procedure 60(b) by the Court below; (2) the misapplication or misconstruing or misinterpretation of this Honorable Court's Opinion in the case of *Federal Deposit Insurance Corporation v. D'Oench Duhme Co.*, 315 U. S. 447; (3) a conflict between a District Court with its Appellate Court; constitutional questions pertaining to due process and equal protection of the laws, a fair and impartial trial and hearing, and unreasonable seizure of property, as provided respectively in the 5th, 6th, and 4th Amendments to the Constitution of the United States; and the exercise by this Court of its supervisory power over lower Federal Courts.

(1) This action was initially begun by the filing of a Complaint *in Equity* asking for a deficiency judgment against petitioner, and to compel the National Dairy Products Corporation to transfer to plaintiff certain National Dairy shares of stock belonging to the Estate of Alfred A. DuBan, Deceased, pledged with said Alker note as collateral security. The Federal Deposit Insurance Corporation claimed that *it* had acquired the note and the collateral as a holder in due course and when there was no default had attempted to illegally terminate the Alker-DuBan agreement. It subsequently developed, long afterwards, that the Federal Deposit Insurance Corporation misrepresented the facts to the trial judge and a judgment was entered

without all the facts being presented to the Court. This instant proceeding was an application for new trial to present to the Court misrepresentation by the Federal Deposit Insurance Corporation and additional testimony of witnesses, one of whom had not been allowed to testify at the trial by the Court, and other witnesses who had not been available at the time of trial and additional testimony of some witnesses who had been there and had gotten additional information, such evidence would have proven the definiteness of the Alker-DuBan-Integrity agreement, and also, that it was not a "secret" agreement.

(2) The question pertaining to Rule 60(b) is that of "whether or not the permission of the Appellate Court is required to give relief from a judgment in appropriate cases, even though the judgment was affirmed on appeal." This question has raised great discussion nationally, and has been the subject of many Law School Review articles as well as being in process as an Advisory Rules Committee recommended new Amendment to the Rule.

Hon. Charles Alan Wright, Associate Professor of Law, University of Minnesota: Assistant to the Reporter, United States Supreme Court's Advisory Committee on Rules of Civil Procedure, writes, in the "Vanderbilt Law Review" of June 1954, pages 532-533:

> "The Advisory Committee has proposed two Amendments to Rule 60(b). The Amendment which is here taken up is a classic example of how and why Courts add to rules glosses which rule making Committees must remove. Before the adoption of the Federal Rules, it was necessary to get leave from the Appellate Court before seeking to reopen a judgment which had been affirmed on appeal. The rule on this subject made no such requirement. Since, in other rules, a requirement of appellate permission was clearly stated, it is fair to suppose that the Committee deliberately refrained from making any such requirement in the care-

ful provisions of Rule 60(b). There were a few Court decisions on this point. Some of the decisions pointed out that the rule required no appellate permission, and therefore said that there need be no such permission. Other decisions applied, without much consideration, the pre-Rules requirement of appellate leave. All the decisions, one way and the other, were obscure and little noticed.

Then, within this last year, the Third Circuit was confronted with a hard case. It involved a hyperlitigious appellant who had been previously before the Court of Appeals four times and had fourteen times sought review in the Supreme Court by means of petitions for certiorari, motions for rehearings of denials of certiorari, and applications for leave to file yet more Motions for Rehearing. One can easily sympathize with the desire of the Appellate judges to see the case terminated, and understand their dismay when one of their district judges granted a motion to reopen the judgment and have a new trial. But one can also see here the truth of the old maxim that hard cases make bad law.

For here the Appellate Court handed down a striking opinion, loaded with quotable epigrams, in which it announced it is beyond the jurisdiction of a district judge to grant such a motion reopening a judgment which had been affirmed on appeal unless the Appellate Court has first given leave. It grants writs of prohibition and mandamus requiring the district judge to vacate his order allowing a new trial.

It is bad enough that the Third Circuit, regardless of the provocation, added a requirement to the rule which the rule does not contain. Worse yet, the requirement so added is a particularly unfortunate one, which would introduce into an attempted simplification of the practice for reopening judgments a useless and delaying formalism. An Appellate Court has no idea

whether the requirements for reopening a case under Rule 60(b) are met until there has been a full record developed. Such a record can only be made in the Trial Court. Of course the District Judge is not free to flaunt the decision of the Appellate Court so far as it goes, but he should be free to consider whether some circumstances of fraud or mistaken or excusable neglect or newly discovered evidence not previously known to either Court compels a new trial. If the Trial Judge goes too far, and grants, in effect, a rehearing of the Appellate Court's decision, the normal processes of review are still open. To require in every case the formality of application to the Appellate Court, which has no facility for examining the merits of the claim for a new trial, to guard against the possibility that a rare District Judge may go too far, is inconsistent with the entire philosophy of the rules. Thus the Committee has proposed the addition to Rule 60(b) a sentence negativing the requirement of Appellate leave."

The above is also discussed in Barron and Holtzhoff's Federal Practice and Procedure, Rules Edition under Rule 60(b), pages 436-438.

The Court of Appeals has restrained District Court Judge Welsh from giving and holding a new trial for petitioner, even though he has twice decided that under Rule 60(b) and particularly by #5 and #6 therein petitioner is entitled to such new trial.

The "Ohio State Law Journal" of the "Summer of 1953" Volume 14, No. 3, states in a footnote, page 3, "A recent striking example of judicial propensity to rewrite procedural rules in Butcher & Sherrerd v. Welsh, 3rd Cir. Aug. 5, 1963, imparting into the broad term of Rule 60(b) a requirement for its use of upper court permission in any case where an appeal has been filed. See, in re Long Island Lighting Company, 197 F. 2d 709, 710 (2d Cir. 1952), S. C. Johnson and Son v. Johnson, 175 F. 2d 176, 177, 184 (2d

Cir.), 949, cert. denied 338 U. S. 860 (1949), Perlman v. 322 West Seventy-second Street Co., 127 F. 2d 716, 719 (2d Cir. 1942)."

As has been seen in the instant case, the Court of Appeals for the Third Circuit requires its permission to a District Court Trial Judge before he can reopen a judgment and grant a new trial where it has been affirmed on appeal. It appears that the Court of Appeals for the Second Circuit does not require that its permission be obtained in similar circumstances and cases (*Perlman v. 322 West Seventy-second Street Co.*, 127 F. 2d 716, 719).

It can readily be seen, therefore, that this is a question of Federal law, and a conflict between circuits, which has not been, but should be, decided by this Honorable Supreme Court.

(2) The United States Court of Appeals for the Third Circuit has decided an important Federal question of substance in conflict with the applicable decisions of this Honorable Supreme Court of the United States, the said Court of Appeals basing its decision in the instant case on the case of *Federal Deposit Insurance Corporation v. D'Oench, Duhme Co.*, 315 U. S. 447, which your petitioner submits was never intended by your Honorable Court to apply to a case like the present one.

In the *D'Oench, Duhme* case there was fraud and an attempt to avoid liability. In petitioner's case there was no fraud, nor was there an attempt to avoid liability. There is no claim that under the agreement in this case Alker was not to be liable on the note at all. It was merely an agreement defining the time of payment of his demand note unless a default was committed in the meantime; and the arrangement for collateral security of said note. No default by Alker ever took place.

The cases following *D'Oench, Duhme* relate to accommodation makers and are cases where there was a definite

effort to make assets of a bank appear of greater value and validity than they actually were, and thus deceive the bank examiners as to the authenticity of the note and the true condition of the bank.

The basis of the *D'Oench, Duhme* case is a Federal policy to protect the Federal Deposit Insurance Corporation and the public funds which it administers against misrepresentation as to securities or other assets in the portfolios of banks which the Federal Deposit Insurance Corporation insured, or to which it makes loans, 315 U. S. 447, 457. It is the "evil tendency" of the acts to contravene the policy governing banking transactions which lies at the root of the "Rule" in *D'Oench, Duhme*. The Court in so ruling relied on Zollman, Banks and Banking (1936) 8847&3. That section deals with cases where the officers of a bank tried by a secret agreement to conceal or misrepresent the true condition of assets of the bank in order to obtain insurance of deposits from the Federal Deposit Insurance Corporation.

Those are not the facts of this instant case. The identical assets with one exception were with the Integrity Trust Company, the insured state bank, at the time the Federal Deposit Insurance Corporation insured the said state bank, as were there when these assets were taken over by it in 1940. The only change was that petitioner executed a new note in 1936 to replace the original two notes. The new note on its face clearly recited that it was "in extension of and substitution for the previous notes," which notation the bank officials testified was notice to everyone of a special agreement attached to the note. There is no evidence in the record that the petitioners or the State bank (Integrity) officials made any misrepresentation of the securities and other collateral pledged for this loan, their genuiness or integrity. Even the bank examiners as testified to by Mr. Matsinger, the chief bank examiner for Pennsylvania, were well aware of the collateral and of an agreement between Alker and the Integrity. This is certainly indicated in the Pennsylvania bank examiners' reports.

If this decision is allowed to stand it will be a great miscarriage of justice; it will impose upon every borrower from, or customer of a bank, the impossible duty of seeing that the records of the bank show his transaction with the banks. A borrower or customer should not be penalized because of the failure of the institution's records, without his knowledge, to satisfactorily show his transactions with it, where the transaction is clear and above reproach.

Also, in view of the fact that the Court of Appeals based its decision on Section 264S of the Federal Reserve Act, which is a criminal provision (and which Congress later removed from this Act), and there was nothing concealed or criminal about this "Alker" transaction, is it fair, just, equitable and conscionable that this decision should stand in a United States Court of Equity?

(4) Here in the instant case, we have the District Court Judge Welsh, who sat as the Chancellor and heard the case tried, insisting that he has the inherent right as the Trial Judge, to grant Petitioner a new trial to serve justice and equity; and the Court of Appeals that says, no, you cannot grant the Petitioner a new trial, without first obtaining permission from us, as the matter is with us on appeal.

Petitioner contends that, in the instant case, where the Trial Chancellor found, from the facts submitted to him, that justice and equity required granting Petitioner a new trial, then he had the legal and inherent right to do so; and, further, under Rule 60(b) if it did apply he was not restricted from doing so as the Rule nowhere refers to obtaining permission of an Appellate Court to do so. And further, Judge Welsh, sitting as a Chancellor in Equity, always retained control over his Court's judgment to make it conform with a change in circumstances between the parties.

(5) As to due process and equal protection of the law, and fair trial, we have here a mandate from the Court of Appeals directly to *Chancellor Welsh* to hear and make find-

ings; but when the time arrived to do so, a different judge was appointed by the Court of Appeals to sit at said hearing. This being done, although Chancellor Welsh was present and available. Petitioner's motion to reopen the case was filed on *November 15, 1961.* The Honorable Judge Layton was assigned to the case on December 8, 1961. On December 4, 1961, Judge Welsh was restricted by order of Chief Judge Biggs of the Court of Appeals to hear the following type of cases: (1) General Naturalizations, (2) Uncontested Motions, and (3) Matters Appearing on Argument List. On December 28, 1961, a further order of Chief Judge Biggs of the Court of Appeals, amended the order of December 4, 1961, by limiting Judge Welsh to hearing only "Naturalizations" and "Uncontested Motions".

It is Petitioner's contention that Judge Welsh was the Trial Judge and Chancellor who heard the case and granted him the new trial, and to whom the Court of Appeals *pointed* the mandate to have a hearing on Petitioner's Motion for a New Trial. He, therefore, would be the correct one to decide whether or not fraud had been practiced upon his Court, and whether or not such new evidence produced by petioner would result in granting a new trial.

(6) Also, that it follows, if the Petitioner's constitutional rights were violated by the alleged improper actions mentioned above, the seizure of his assets and property by Federal Deposit Insurance Corporation would be unreasonable and unlawful.

(7) As to the Lower Courts' determinations of contract law, it is contended by Petitioner that it erred in not finding Petitioner had a good, lawful, binding contract with the Integrity Trust Company. Their error arises from assuming that as it found there was no period of duration of the agreement stated, that it must be held void for uncertainty.

Petitioner further claims the Court should have deduced the terms from the nature of the subject-matter and

the facts affecting it. The Courts should have construed the agreement as to carry into effect the reasonable intention of the parties as it was or could have been ascertained with reasonable certainty.

The additional testimony of the new, available witnesses, including Pellini, Matsinger and Santamarie, certainly proved definiteness of the time of the agreement which would corroborate and verify the deduced findings of the Court, and the Alker-DuBan agreement was not a "secret-concealed" agreement.

It is to be noted by all the evidence in the case that Alker carried out completely all of the terms and conditions of the Alker-DuBan-Integrity agreement and therefore the sale of the collateral accompanying his note by the Federal Deposit Insurance Corporation was improper and unlawful and petitioner Alker therefore contends that he should be placed in his proper position as owner of said collateral; and which collateral should be ordered returned to him by the Federal Deposit Insurance Corporation, subject to payment of any amount due on his loan, with credit given to Alker for interest and dividends that would have been received on said collateral.

(8) A further cogent reason for this Court's review of the decision below is based upon the sound proposition that one district judge of coordinate jurisdiction with another district judge may not review a prior ruling of a first district judge in such a way as to overrule his granting of a new trial, particularly where the first district judge who granted the new trial was also the trial judge who heard the case originally and who handled all intervening motions and rules regarding the case.

This is especially illustrated by the decision of the Honorable Court of Appeals for the Third Circuit below in the case of *U. S. v. Wheeler*, 256 F. 2d 745, wherein the Court below emphasized as follows: "As we have pointed out, the heart of the matter is whether a second judge could

properly entertain a reconsideration at all. We have indicated that if the first judge is available, the matter should again be presented to him."

In this particular case the Honorable George A. Welsh was and still is living and available as a reviewing judge for the reconsideration of a new trial motion. It follows, therefore, that the learned Court of Appeals below erroneously failed to follow its own ruling in the *Wheeler* case when it went outside the Eastern District of Pennsylvania entirely to find a "*stranger*" jurist in the District of Delaware.

This is so important a ruling and one which would seem to require uniformity throughout the nation, especially since it appears that there is a conflict of views between the Courts of Appeal of the Third Circuit and of the Second Circuit on this precise point of law.

ARGUMENT.

A careful perusal of all of the facts concerning this matter clearly indicates that the old adage of "losing sight of the forest for the trees" was applicable hereto. Throughout the long years of litigation and in each and every Court in which this matter has been vigorously pressed, it becomes apparent that the basic concept of equitable justice has been ignored in that emphasis has always been placed upon strict adherence to civil rules such as 60(b). During the course of the long years of protracted litigation, most certainly a new trial could have been given to the petitioner herein without having caused anyone any undue hardship to any of the parties concerned. It would appear from the opinions of the various Courts, other than the opinions of Judge Welsh granting a new trial, that they would rather rely upon the theory that their hands are tied by the rule which would preclude them from actually granting an opportunity to the petitioner to acquire justice for himself, particularly concerning a matter which basically is his entire life. We urge upon this Court that in any set of facts if for one moment there does exist a rule which by its operation would amount to creating an injustice concerning a matter which is most vital to a litigant, such a rule would be unconstitutional and, to say the least, would be adverse to all principles of equity. We urge upon this Court that the long history of the sincere and undying efforts of the petitioner in this case is more than conclusive proof of the fact that he in his own heart knows full well that if the Court would allow him a new trial he could prevail to the extent that he would receive the justice and equity which he has so long sought and fought for. In many respects the position of the petitioner herein and at his ripe, old, age, feels the importance of this request for justice and equity has been no different than if this were a criminal matter. We appeal to this Honorable Court's broad powers to afford relief despite

the existence of any rules, which apparently seem to be to the contrary. We urge this without for one moment relinquishing the fact that we believe even from a strict legal interpretation, the petitioner is and was entitled to his proper day in Court.

In addition to the above, we are herewith presenting further argument, as follows:

1. The Lower Appellate Court Did Misinterpret, Misconstrue and Mis-apply Federal Civil Rule of Procedure 60(b).

A perusal and review of petitioner's Motion for a New Trial (Brief Appendix 1-A) will show that the request for relief under rule 60(b) was only one of the many requests for relief under petitioner's said motion. There are many other reasons stated therein for a new trial which call for the exercise of equity and justice independent of said rule 60(b); and on which the Court could have based an independent action for a new trial as requested by petitioner, to use his motion also as an independent action for a new trial. A perusal also of the record discloses that petitioner began making motions for a new trial as early as October 23, 1944, and continued making them until the present motion was acted upon. A reading of Federal Civil Procedure rule 60(b) indicates that nowhere therein does it provide that a lower trial Court must obtain the permission of an Appellate Court to grant a motion for a new trial when equity and justice calls for same, even though the case has been referred to the Appellate Court for action. This has become a national question of argument among the rule makers and Courts as to whether said permission is required as this matter has been shown in petitioner's reasons for allowance of the writ, and will not be repeated here.

A reading of said rule also reflects that said rule does not limit the power of the Court to entertain an independent action to relieve a party from a judgment or—to grant relief to a defendant not actually personally notified as

provided in title 28 U. S. C. 1655, or to set aside the judgment for fraud upon the Court.

In Petitioner's said motion for new trial, he alleges, in Paragraph 4 therein, fraud and misrepresentation by the Federal Deposit Insurance Corporation upon the Court. The petitioner contends and submits that he presented sufficient evidence to the lower Court as to fraud and misrepresentation upon the Court by the Federal Deposit Insurance Corporation which should take it out of the one-year rule and cites the case of *Publicker v. Shallcross*, 106 F. 2d 949, Third Circuit Court of Appeals opinion in which that Court apparently found that a Court could open a judgment any time where fraud and misrepresentation upon the Court have been exercised and not just within any restricted period (see page 36b Appellants' Brief).

It is further contended by the petitioner that the District Trial Judge and Chancellor did not have to obtain permission of the Appellate Court in order for him to grant petitioner's motion for a new trial to see that equity and justice is reached.

It appears that District Judge Layton based his decisions upon rule 60(b) as the sole reason for reaching the conclusions that he did, and that he did not consider all the other reasons mentioned for granting a new trial.

As we have seen, Judge Welsh (48 FRD 497) found that petitioner was entitled to a new trial on the ground of newly discovered evidence, and that, in his judgment, justice and equity required that the defendant Alker should have an opportunity to submit the type of evidence referred to by Alker so that any facts elucidated may be embodied in the findings of fact and conclusions of law and in any opinion subsequently filed in the case.

As has been seen in its opinion, the Court of Appeals issued a writ of mandamus directing Judge Welsh to vacate his order granting petitioner's motion for a new trial and thereupon to reconsider and dispose of that motion in a manner not inconsistent with that Court's opinion.

These directions thereby brought the instant case within the latter part of Clause (5) of Rule 60(b) providing that a Court may relieve a party from a prior judgment that is no longer equitable and should not have prospective application, and Clause (6), even though more than one year or more has elapsed since the date of trial.

Notwithstanding these clear exceptions to the one-year limitation on new trial motions, Judge Layton, in discussing Rule 60(b), in his opinion studiously avoids any other mention of the latter part of Clause (5), glosses over it, and hastens to show why a new trial is not justified under Clause (6). Nowhere in his opinions does Judge Layton refer to a judgment that is no longer equitable to have prospective application. All this avoidance to the latter part of Clause (5) being made even though the Trial Chancellor found that justice and equity required that Alker should have an opportunity to submit his evidence at a new trial based upon this Clause (5), certainly requires some consideration by this Honorable Supreme Court.

Neither do Judge Layton's opinions refer to or cover petitioner's allegations of fraud and misrepresentation practiced upon the Court by the Federal Deposit Insurance Corporation. This Supreme Court has held that a Court may at any time set aside a judgment for after-discovered fraud upon the Court. *Hazel Atlas Glass Co. v. Hartford Empire Co.*, 322 U. S. 238.

The petitioner contends and submits that he has produced evidence to prove that the District Court can and should relieve him from said judgment, particularly, under Clauses (2) and (3) as his motions for a new trial were continuing and inclusive motions and should not be restricted by the one-year period, and further as to fraud and misrepresentation without restriction, and under Clauses (5) and (6) in that the judgment is no longer equitable and should no longer have prospective application and that there is extraordinary cause for justifying relief from the operation of the judgment.

It appears that the procedure in this matter concerning Rule 60(b) is in two phases, and they are the provisions of Rule 60(b) *before* and *after* its amendment in 1948. In the early Rule 60(b) it provided, inter alia, "This rule does not limit the power of a Court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside *within one year*, as provided in Section 57 of the Judicial Code, U. S. C. Title 28, § 118, a judgment obtained against a defendant not actually personally notified". It also states, inter alia, ". . . on motion of the Court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this sub-division does not affect the finality of a judgment or suspend its operation. . . ."

Old Rule 60(b) was amended to include, among other provisions, Clauses (5) and (6) particularly the latter part of (5) affording relief from further prospective operation of an inequitable judgment; and the 6th reason for relief from a judgment for "any other reason justifying relief from the operation of the judgment." For these two clauses or provisions for relief no time limit is prescribed, but of course the motion must be made in a reasonable time. The Court of Appeals for the Third Circuit has found that petitioner's motion for a new trial was timely filed.

It also appears that Judge Welsh, when he granted petitioner's motion for a new trial, was referring to old Rule 60(b) as he states in his opinion of November 3, 1955 (18 F. R. D. 497). ". . . The Trial Judge was confronted with the one-year limitation in the Supreme Court Rules, Fed. Rules Civ. Proc. rule 60(b), 28 U. S. C. pertaining to the subject and realized that, technically, the defendant Alker's request for a new trial was barred. But having in

mind that the fundamental purpose of the Court is to secure justice, under law, and that the rules of Court which are of their own making are subject to their own interpretation in the light of precedent, tradition and equitable principles, we granted the motion for a new trial. The Trial Judge was moved very strongly to this conclusion by the allegations of defendant Alker that the witnesses he could produce upon a new trial and which he could not present at the first trial would testify on the very subject matter which was the controlling policy in the Supreme Court decision which ruled that case. . . . " " . . . The Circuit Court in its wisdom took the view that the one-year limitation of the Supreme Court Rules barred the granting of a new trial. . . . " "Pursuant to that authority we proceeded to have a hearing on the motion of defendant Alker for a new trial. Briefs were filed by both sides, decisions cited, and the case fully argued from all angles considered pertinent. The case is now before us as if no appeal had been taken, the writs of prohibition and mandamus having been vacated. We therefore are approaching the question as though the defendant Alker, in due course and timely, had moved for a new trial, not upon errors of law or anything that took place at the trial, but based solely upon affidavits of the substance of the evidence he would produce. In our judgment justice and equity require that defendant Alker have an opportunity to submit this type of evidence so that any facts elucidated may be embodied in the findings of fact and conclusions of law in any opinion subsequently filed in the case. The discretion and latitude allowed a Trial Judge in granting a new trial must not be exercised with capriciousness or arbitrarily but with a conscientious feeling as Chancellor that these additional witnesses should be heard, not at this time, but at a new trial where the testimony produced by direct examination and cross-examination could be the basis of findings of fact. Feeling as we do, we grant the motion for a new trial, leaving to the Appellate tribunals the question

of the interpretation and application of the one-year limitation in Rule 60(b) of the Federal Rules of civil procedure."

Later, however, after the amendments of Rule 60(b) had been in effect and force, it appears Judge Welsh considered petitioner's motion for a new trial, under the light of the new Rule 60(b) with all its amendments, including its clauses (5) and (6).

In *Federal Deposit Insurance Corporation v. Alker*, 234 F. 2d, page 116, Judge Maris states, ". . . It is not for a district judge thus to abdicate his functions to interpret and apply the law, the very task he was commissioned to perform. On the contrary it is his basic duty to determine whether he has power before he assumes to exercise it. He is bound, just as we are, to interpret and apply the Federal Rules of civil procedure which have the force of statutes and are binding upon him. In belated recognition of this duty, Judge Welsh, in his Answer to the Petition for writs of mandamus and prohibition states that he granted the motion for a new trial because he believes that Rule 60(b) was not a bar to his so doing. He also suggests in his Answer that clauses (5) and (6) of Rule 60(b), which give the District Court power to relieve a party from a judgment for the reason that "it is no longer equitable that the judgment should have prospective application", clause (5) or for "any other reason justifying relief from the operation of the judgment, clause (6) furnishes a basis for his action".

2. The Lower Appellate Court Did Misinterpret, Misconstrue and Mis-apply This Honorable Court's Opinion in the Case of Federal Deposit Insurance Corporation v. D'Oench, Duhme Co., 315 U. S. 447.

Your petitioner submits that this Honorable Supreme Court never intended, in its opinion in the *D'Oench, Duhme* case, to apply to anything but a fraud case; nor that the criminal section of the Federal Reserve Act should so apply. (See Justice Roberts' letter (63a of Appellants' Brief and Appendix).)

It is contended that the *D'Oench, Duhme* case refers only to outright fraud and criminal matters, none of which were alleged, pleaded or found herein. Even Congress deleted the criminal statute from the Federal Deposit Insurance Act, as well as passing the Act of September 21, 1950, providing that the rights of depositors and other creditors of a State Bank shall be determined in accordance with the applicable provisions of State law (12 U. S. C. A. 1821g).

In attempting to justify his application of the decision in *D'Oench, Duhme Co. v. F. D. I. C.*, Judge Layton concludes that the extension agreement was still a secret one as far as the Federal Deposit Insurance Corporation was concerned. (Appellants' Brief and Appendix 21a). This, it is contended, is contrary to the evidence.

Judge Layton has not apparently given any weight or credence to Mr. Matsinger's (the Pennsylvania bank examiner) testimony, affidavits, depositions and reports. This evidence in itself is sufficient to take this matter out of the *D'Oench, Duhme* doctrine of a "secret agreement". Matsinger's evidence definitely indicates that he and other bank examiners knew of Alker's agreement, loan and collateral. Even, George W. Brown, President of the Integrity Trust Company, testified that he had talked to the bank examiners about the Alker loan (P. 287(a) of N. T., cases Nos. 10002 and 10015).

Howard B. Dietz, one of plaintiff's witnesses, and a Federal Reserve bank examiner, testified that "Mr. Malsinger" (Matsinger), the State Department examiner, met with and talked to the officers of the Integrity and went over their report with them (P. 319(a) N. T. Cases Nos. 10002 and 10015).

Inasmuch as the Federal Deposit Insurance Corporation had knowledge of Mr. Matsinger and his official State reports at the trial, there is a presumption that he would have testified adversely to plaintiff's contentions had he been called.

Again petitioner submits that there has been a misinterpretation, misconstrual and misapplication of the *D'Oench, Duhme* case to this case by the Court of Appeals; that the facts of this case are entirely different from *D'Oench, Duhme* and the case does not apply.

Referring to the Court of Appeals' opinion in *Federal Deposit Insurance Corporation v. Alker*, 151 F. 2d 907, Chief Judge Biggs apparently finds that there was a valid oral contract between Alker and DuBan and Integrity. He assumed that there was a valid oral contract, and that Alker and DuBan did everything required of them by this contract. However, he found that even this being so, petitioner could not get over the hurdle of such a contract being a secret agreement not mentioned in the Integrity's records, and, therefore, not known to the Federal Deposit Insurance Corporation when it took over the Integrity's assets. That such a contract being a secret one, it was controlled by the doctrine of the *D'Oench, Duhme* case, and therefore could not be enforced.

Chief Judge Biggs, at the end of his opinion, states "taking this view, the issue upon which the case turns is one of law, and for this reason it is not necessary to remand the case for necessary and proper findings by the Court below."

The petitioner, in consideration of the above paragraph, submits to this Honorable Supreme Court that if Chief Judge Biggs had remanded the case for necessary and proper findings by the District Court, he would have ordered the Trial Court to find that the Alker-DuBan-Integrity contract was a valid, oral contract.

It further appears throughout all of the Opinions of the Court of Appeals for the Third Circuit that the actual and sole basis of its finding against petitioner, Alker, is the doctrine of the *D'Oench, Duhme* case as controlling his case. That Court finds that the facts in *D'Oench, Duhme* closely resemble the facts of the Alker case at bar, and states that

any differences that exist are immaterial. How it can make such a finding is hard to perceive. Comparing them we see that that deception and fraud was intentionally and actually practiced, whereas in the Alker case there was no fraud or deception committed. The note in *D'Oench, Duhme* was executed and given for the purpose of permitting the bank to avoid having its records show any past due bonds which constituted a misrepresentation which would deceive the creditors of the bank, the State banking authorities and the Federal Deposit Insurance Corporation. The District Court in that case held that the petitioner therein was estopped in asserting want of consideration as a defense, whereas Alker is not so estopped. He has the right to prove that Federal Deposit Insurance Corporation was not a holder in due course of his note, but only an assignee and pledgee subject to all of Alker's defenses. In *D'Oench Duhme*, the Acts complained of were criminal in nature, Alker was not. There is a finding of no fraud in Alker's case. Alker has not committed any wrongful act. Also, he was the maker of his note whereas in the other case there was only an accommodation note executed. There has never been in the Alker case an understanding that his note would never be enforced. His agreement was only good as long as he did not default on its conditions and for the term of same. Further, the bank examiners' records and reports disclosed to the Federal Deposit Insurance Corporation their appraised values of Alker's assets, so it could not have been deceived about their value, and the agreement. Nothing was done in the Alker case to conceal any of the facts of his and Mr. DuBan's agreement with the Integrity, so as to hide the truth from the vigilant eyes of the bank examiners. Mr. Matsinger testified that the Integrity's records certainly disclosed to him that there was some kind of agreement between Alker and the Integrity, and, as a matter of fact, the agreement was good banking practice as it provided the Integrity with 1,000 more shares of National

Dairy stock as collateral security for the Alker loan. This testimony is in conflict with Chief Judge Biggs' finding "that the bank examiners who examined the books of the trust company over a period of years found no notation of it. No officer of the trust company made any statement to any examiner that there was an agreement in respect to the Alker loan."

This Court is asked to take notice that the Federal Deposit Insurance Corporation in its complaints did not allege fraud or a secret agreement, and therefore, without having been pleaded, it cannot be asserted in the case.

3. A District Court Trial Judge, Sitting as a Chancellor in Equity, Has the Right to Grant Petitioner a New Trial, to Reach Justice and Equity, Without Obtaining Permission From the Court of Appeals, to Whom the Matter Has Been Appealed and Affirmed by It.

Petitioner contends that a Court of Equity is not restricted to an adjustment of the rights of the parties as they allegedly existed when the suit in equity was brought, but can give relief appropriate to events occurring pending the suit; that equity acts in the present tense and molds its decree to actualities." That such a District Equity Court, even though the matter has been appealed and affirmed, has an inherent right to relieve a party from a judgment tainted by fraud on the Court by an adverse party, or to see that justice and equity is done, particularly when the Chancellor believes the interests of jus' require a new trial and the record discloses that there is a proper basis for such relief; that Rule 60(b) was never intended to deprive a trial judge of his discretionary power to direct a new trial whenever he considered such a course necessary to defeat injustice. It is further submitted that Judge Welsh did not exceed his discretionary authority in granting petitioner a new trial.

> "Where verdict was contrary to right and justice of the case, it was the right and duty of district judge to

set it aside and grant new trial even if there had been sufficient evidence sufficient in law to take case to jury." (*Foreman v. Texas & New Orleans R. Co.*, 205 F. 2d, No. 1, page 79)

Piercing the veneer of phrases, the decisions disclose that federal courts have always exercised broad discretion to right obvious injustices . . . even if technicalities must be twisted to do so—8 Cyc. Fed. Prac. § 3584, and see Moore & Rogers at 688.

4. The Petitioner's Constitutional Rights Were Violated by the Court of Appeals Ordering a Judge, Other Than Judge Welsh (the Trial Chancellor), to Hear Argument on His Motion for a New Trial.

The Fifth Amendment to the Constitution of the United States provides; ". . . no person shall be deprived of life, liberty or property without due process of law . . . ."

Judge Layton in his memorandum opinion states that "Judge Welsh has retired and spends long periods of time each year away from Philadelphia." This may be so, but Judge Welsh was present and available when petitioner's petition asking for rehearing was filed on November 15, 1961, and was still assigned to hearing arguments as well as other matters. It was not until December 4, 1961, Chief Judge Biggs of the Court of Appeals, by order, restricted him to hear only cases of naturalization, uncontested motions, and matters appearing on the Argument List, and, on December 28, 1961, amended said order by limiting Judge Welsh to hearing only naturalization and uncontested motions.

Petitioner contends and submits that the Lower Courts failed to give him equal protection of the laws and due process, or guaranteed him by the Fifth Amendment to the Constitution of the United States, by their ordering Judge Welsh not to hear arguments on cases, which prevented him from hearing petitioner's Motion and in assigning a Judge from another District to hear and rule on the matter.

5. The Lower Court Misinterpreted the Law of Contracts and Its Duty to Ascertain the Definiteness of a Contract When It May Reasonably Be Ascertained From the Facts on Hand and the Circumstances of the Matter.

The trial court's opinion is very uncertain and vague concerning the agreement. The court finds that the parties may have had a "satisfactory understanding," and then holds "the agreement lacks essential definiteness and certainty . . . certainty as to proof and certainty as to time of performance, that is, the limit of restraint" (Appendix, p. 479(a)).

It is contended and submitted by the petitioner that the Lower Court erred in not finding he had a good, lawful binding contract with the Integrity Trust Company, and that their error arose from finding that there was no definite period of duration of the contract stated, and that it must be held void for uncertainty.

Petitioner submits that he has and did present more than sufficient, credible and competent evidence, to prove his agreement with Integrity and DuBan, and also, as to its definiteness of duration. That the Courts failed to take into consideration the testimony of Mr. Santa Marie and Mr. Pellini covering same. Further, that it was the Court's duty to deduce the terms of the agreement from the nature of the subject-matter and the facts presented affecting it. That the Courts should have construed the agreement as to carry into effect the reasonable intention of the parties as it was or could have been ascertained with reasonable certainty.

The petitioner cites the case of *Rossmassler et al. v. Spielberger et al.*, 270 Pa. 40, 41, which states inter alia:

> ". . . Nor is there any real difficulty growing out of the clause under consideration. Appellants' error arises from assuming that because no period of duration is stated, the contract must be held void for uncertainty; where as the Courts will always deduce the term from the nature of the subject-matter, if it is at all

possible so to do. The law does not favor, but leans against the destruction of contracts because of uncertainty. Therefore, the Courts will, if possible, so construe the contract as to carry into effect the reasonable intention of the parties if that can be ascertained. Though there are some formal imperfections in a written contract, still it is sufficient if it contains matter which will enable the Court to ascertain the terms and conditions on which the parties intend to bind themselves. The maxim, 'Id certum est quod certum raddi potest, applies. 6 Ruling Case Law 645.' Apart from contracts which from their inherent nature, imply a power of revocation, it would seem that the intention of the parties to an agreement, that it should be perpetual and without limit as to duration, could not be more properly expressed than by silence as to any time limit or power of revocation. Although there seems to be some authority to the contrary, the rule seems to be that where no limitation is expressed in the agreement, neither party can terminate it without the consent of the other, unless the making of the contract itself indicates with sufficient clearness that the parties must have intended some other determination. . . . ."

and *Kirk, Aplnt. v. Brentwood, M. H., Inc.*, 191 Pa. Superior 492, 493:

". . . It is of course true that, in order for a contract to be enforceable, the agreement of the parties must be sufficiently definite that their intention may be ascertained to a reasonable degree of certainty: Seiss v. McClintic-Marshall Corp., 324 Pa. 201, 188 A. 109. However, 'the law does not require the impossible or impracticable of those who enter into business agreements or transactions; and it is therefore well settled that the terms of a contract need not be expressed with exactness but only with reasonable certainty' . . . ." *Betterman v. American Stores Co.*, 367 Pa. 193.

Oil Creek Twp. Sch. Dist. v. Rome Twp. Sch. District, 2 D. & C. 509, 510, 511 (Pa.):

". . . Furthermore under the decisions of the Appellate Courts of this Commonwealth, it is not the law that because no period of duration is stated, a contract must be held void for uncertainty. This contention came before the Court in the case of Rossmassler et al. v. Spielberger et al., 270 Pa. 31. . . ."

6. Judge Layton, Being a District Judge of Coordinate Jurisdiction Sitting in the Same Court and in the Same Case, and Upon the Same Facts, Should Not Overrule the Original Decision of the Prior Judge, Judge Welsh.

Petitioner contends that Judge Layton could not overrule Judge Welsh's order granting him a new trial in this matter. This contention is based upon the decisions of the Court of Appeals for the Third Circuit in the cases of *United States v. Wheeler*, 256 F. 2d 745; and *T. C. F. Film Corporation v. Gourley*, 240 F. 2d 711.

In the *Wheeler* case the Court states "as we have pointed out, the heart of the matter is whether a second judge may properly entertain the reconsideration at all. We have indicated that if the first judge is available the matter should again be presented to him."

7. As to 12 U. S. C. A. Section 1821(G) It Is Contended That This Act Was Amended by Congress With the Purpose to Prove That Prior to Such Amendment It Was the Intent of Congress That Any Agreement, in the Absence of Fraud, Was Binding on the Corporation.

CONCLUSION.

It is respectfully submitted that in consideration of the foregoing reasons, and in the interest and pursuit of equity and justice, the petition for a Writ of Certiorari should be granted by this Honorable Court. It is certified that this petition is not filed for delay.

WHEREFORE, Petitioner prays that a Writ of Certiorari be granted.

Respectfully submitted,

JAMES J. REGAN, JR.,
ROBERT M. TAYLOR,
Attorneys for Petitioner Alker.

Appendix.

DEPOSITION OF LOUIS J. SANTAMARIE DATED DECEMBER 13, 1946.

(2) *

LOUIS J. SANTAMARIE, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Alker:

Q. Mr. Santamarie, did you in the fall of 1936 visit the Integrity Trust Company at 16th and Walnut Streets in connection with placing a policy of insurance in connection with a loan of Harry J. Alker, Jr., with the Integrity Trust Company?

A. I did.

Q. Whom did you see?

A. I saw Mr. Semish.

Q. Who is Mr. Semish?

A. Mr. Semish was the executive officer in charge of the loans down there.

Q. What took place between you?

A. When I went in there he told me that he was interested in procuring an insurance policy that

(3)

would run ten years, because of the fact that he had a loan that would run that time unless it were paid off sooner.

* Figures in parentheses refer to page numbers of typewritten transcript.

So when I decided the form of insurance, I elected what we call the YRT. It would run for ten years, but in the event of the loan being paid off sooner, the policy could be terminated at a lower cost to the buyer. That was the story in brief, as I remember it.

Q. Did he state whose loan it was?

A. Yes, Harry Alker's.

Q. How did you come to go there?

A. Why, Mr. Alker telephoned me and told me to go down there and arrange for whatever insurance they required to cover this loan.

Q. Repeat again just what he said to you and what you said to him.

A. Well, he told me that they wanted a loan to cover—they wanted an insurance policy to cover a loan that would run ten years, and I told him that I could offer that in the form of an insurance policy which we called a YRT, abbreviating the yearly renewable term, which would run ten years or could be liquidated sooner at the option of the parties

(4)

in interest.

Q. As a result of what he said, what did you do?

A. As a result of that discussion, I produced this ten-year $100,000 policy, which was in turn turned over to Mr. Semish at the Integrity Trust Company. I personally delivered the policy.

Q. What is your business?

A. Life insurance.

Q. How long have you been in that business?

A. I am ashamed to tell you. Since 1905.

Q. Do you specialize in it or do you represent a particular company?

A. I specialize in life insurance. I represent probably ten or fifteen—twenty companies. There are years that I

am licensed by twenty companies and years that I am licensed by only five, depending on the volume of business that is available for distribution among these companies.

Q. Did Semjsh say anything to you about how long the loan was to run?

A. Only in so far that I told you there, that he said this loan would run ten years or less, dependent upon when it was liquidated, but he wanted a policy

(5)

to cover a period of ten years, and that is what I got him. That policy ran exactly ten years and expired by its terms on the 28th day of October, 1946, and it was replaced since that time by another policy issued by the same company for the same amount at an ungodly premium.

I know you feel that, don't you?

Q. You mean the second?

A. The second policy that took the place of the other.

Q. Did he discuss the loan with you? Did he tell you what kind of loan they were making, or anything?

A. He told me it was a collateral loan. No other details that I remember. As my memory serves me, it was a renewal of a loan, because there was another policy which expired at the time, and this policy was taking the place of the one that expired.

Q. Were you in court prepared to testify to that when the case was tried before Judge Welsh?

A. Yes, I was down at the District Court.

Q. You weren't allowed to testify?

A. So I was informed.

Q. Do you know how long the first policy had run?

A. Yes, I do. It was a five-year term.

(6)

Q. You examined that policy yourself?

A. Yes, I examined that policy. It was a five-year term, non renewable, so we had to replace it.

Q. He told you this time it was to be a ten-year?

A. Ten-year term, that is right, and that is what we had.

Mr. Alker: Cross-examine.

CROSS-EXAMINATION.

By Mr. Olmsted:

Q. Mr. Santamarie, explain more in detail what a YRT policy is.

A. A YRT policy is what is known as a yearly renewable term. The actual form is it starts off at a low premium rate. It is what is called in terms of life insurance as a natural premium. The natural premium steps up from year to year as the insurance grows older, and so at the tenth year the premium is several times higher than the first year, but in the event of its termination at any time from the first to the tenth year, the insured get out with a lower outlay. Of course, when his premium goes over the fifth year, then he is being punished because he is paying a higher rate than he would have bought had he bought straight term. In other words, it is

an average premium. If the policy was to run twenty years, which would be also on a stepped-up premium every year, that would continue until the twentieth year, when the premium would be at its highest.

Q. So that if the policy were surrendered at the end of a year or two, the insured would save money?

A. That is right.

Q. But if it ran for the full term of ten years, it would cost him more than the level-premium policy?

A. Yes.

Q. Who opened the conversation when you went there?

A. Well, of course, I announced myself as coming there at the suggestion of Mr. Alker for the purpose of arranging whatever insurance they required.

Q. Was there nothing said about which would be cheaper for Mr. Alker?

A. No. I decided upon that since it was a loan that could, if liquidated in the interim from the first to the tenth year, if it could be liquidated in the meantime, he saved money, that is all. That is my duty to the client.

Q. I say, did you discuss the question of cheapness with Mr. Alker in your conversation?

(8)

A. Not that I know of. I selected the form of insurance.

Q. Mr. Semish said that the loan might run ten years?

A. He told me that he wanted the policy to cover a minimum period of ten years.

Mr. Olmsted: That is all.

RE-DIRECT EXAMINATION.

By Mr. Alker:

Q. Who placed the first insurance?

A. I may be in error about the name of the individual, but I think it was a gentleman by the name of Crosby. I didn't handle that transaction. The policy would show the name. The policy always carries the gentleman's name that writes the insurance.

Q. Did Mr. Semish tell you what kind of loans they were making? Did you discuss that with him?

A. Not in detail, except I knew it was a collateral loan, because that happens from time to time in our business that we have to get a policy of insurance to cover a loan at a bank.

Q. Did you discuss the nature of the loan?

A. What do you mean by the nature of it, Mr. Alker?

(9)

Q. Why he wanted the insurance, and so forth?

A. Oh, he wanted to cover the liability that they would be exposed to if anything happened to you before that loan was liquidated?

Q. What do you mean by "liquidated"? Paid off?

A. Paid off. That is the purpose of a life insurance policy accompanying a collateral loan.

Q. To protect them until the loan is paid off?

A. To guarantee the bank that they will be protected until the loan is paid off.

DEPOSITION OF LOUIS SANTAMARIE, JOHN A. BARONE, CHARLES D. MC AVOY, DATED DECEMBER 20, 1946.

(11)

LOUIS J. SANTAMARIE, recalled.

DIRECT EXAMINATION (Continued).

By Mr. Alker:

Q. Mr. Santamarie, you read your testimony given last Friday?

A. Yes.

Q. Does it clearly state what you intended to state about this matter?

A. Yes, with several important exceptions.

Q. What are they?

A. Where the word is used, "liquidate," it was used in error, because what I intended to convey was that this policy was to run for the entire period of ten years unless the loan was repaid sooner by the borrower. I did not intend to give the impression that the bank would have the right to terminate the loan prior to the ten-year period.

(12)

Mr. Alker: Cross-examine.

CROSS-EXAMINATION.

By Mr. Olmsted:

Q. What are you reading from, Mr. Santamarie?

A. I read this—I wrote this out myself last night. I read this testimony, and the word "liquidate" seems to convey a misunderstanding. It did in my mind, and I thought it would in your mind or in the mind of the Court.

Q. Have you since the last hearing, have you talked this over with Mr. Alker?

A. No.

Q. How did you happen to come here today, then?

A. Why, he called me—he gave me this and asked me to read it over and see if that is what my intentions were, and the word "liquidate" was the word that I misplaced in it. In other words, liquidate, I have no part in the liquidation of any account. My interest in this matter was insurance only; not liquidation. I had no knowledge of any liquidating facts.

By Mr. Alker:

Q. You came to my office about ten minutes ago, fifteen minutes ago?

By Mr. Olmsted:

(13)

Q. But you did discuss it with Mr. Alker on the telephone?

A. As to the gist of this?

Q. As to the word "liquidate."

A. Yes, the word "liquidate" is in error.

Q. Now, you say in this that you did not intend to give the impression that the bank would have the right to terminate the loan prior to the ten-year period?

A. I have no right to give such an impression.

Q. That's right; you didn't intend to give the contrary impression, either?

A. I didn't intend to give any impression one way or another in that respect.

JOHN A. BARONE, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Alker:

Q. Mr. Barone, what is your business?

A. Real estate business.

Q. Where are you located?

A. 6451 Frankford Avenue.

Q. And where were you employed from 1930 to 1942?

A. In the office of Harry J. Alker, Jr.

(14)

Q. What was your position there?

Office manager, bookkeeper, and various other duties.

Q. And as such, did you make any visits to the Integrity Trust Company in connection with my loan?

A. I was there quite often in reference to your loan.

Q. Whom did you contact?

A. Mr. Semish.

Q. Who is he?

A. Vice-president. Mr. Antrim and Mr. Fink.

Q. Do you remember any conversations that you had with Mr. Semish, the vice-president, in reference to the loan? What was your object in going there?

A. Well, I handled most of the details of the loan. By that, I mean the insurance payments, payment of interest; any other details necessary to keep the loan in proper shape.

Q. Do you remember any conversations you had with Mr. Semish in reference to the loan the latter part of 1936?

A. Yes, I do. We spoke about it quite often, almost every time I went in the bank, either to make deposits or in reference to the loan. And Mr. Semish and I spoke about the—an agreement whereby the loan was not to be

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Mr. Olmsted: Just a minute, that isn't

(15)

answering the question.

Mr. Alker: I asked him whether he remembered any conversations in the end of 1936.

The Witness: Yes, sir, as I was saying, why, Mr. Semish and I spoke about it, about Mr. Alker's loan, and what a load he was carrying, and he said at the

time, way back in 1931, we thought Mr. Alker, due to the market and such things, Mr. Alker would be able to pay this thing off by 1936. It looks like we guessed wrong, and I think Mr. Alker is a good, hard-working man, and a good customer of the bank, and I think he can pay this thing off in the next ten years.

By Mr. Alker:

Q. Did he say anything about any agreement with me in connection with it?

A. He did say there was an agreement between you and the bank in reference to keeping the loan on the books.

Q. As to the term?

A. That's right, I say, in the next ten years, you may be able to pay it off. As I said before, he thought they had guessed wrongly when they first, when the loan was not paid off by 1936. He figured well, he should be able to pay it off in the next ten years.

Q. Did he say whether or not they had extended it to

(16)

that time?

A. He told me, we will work with him, and I think he will be able to pay it off in ten years.

Q. Did he say anything about an extension? Did he say anything about the life insurance and so forth? You handled that.

A. Oh, at the time in 1936, a five-year term policy expired, and in its place we placed a ten year term policy with the Manufacturers Life, I believe it was.

Q. Who placed that policy?

A. Why, Mr. Santamarie.

Q. Did he discuss it with you at any other times after 1936?

A. Oh, yes, quite often. I mean, as I said before, I used to go in there in reference to deposits, or in reference to the loan, and I stopped by his desk and discussed things in general, and, of course, your loan came up. And in those

conversations he left the impression that nothing would be done, at least for ten years, anyway.

Q. What do yo mean by—what did he say?

A. Well, he says Harry is a good worker, he says—as I said before, he couldn't make it in the last five years due to the fact we guessed wrongly, but I think he will

(17)

be able to clean it up in the next ten years. He can't go wrong for ten years.

Q. Did he say whether or not he had extended it for ten years?

A. I implied from his conversation they did extend it.

Q. What did he say?

A. Well, the impression he gave me was that they wouldn't bother—wouldn't disturb the loan for ten years. That is the impression he gave me from his conversation.

Q. Do you remembr the conference I had with Mr.—with the Integrity on the subject?

A. Mr.——

Q Brown. You weren't present?

A. No, I wasn't present then.

Q. Did you go with me fo the Federal Deposit Insurance Corporation after they took over the loan?

A. Yes, I did.

Q. And who were present there?

A. Mr. Holl, I believe it was, you and myself.

Q. Who is Mr. Holl?

A. He was the representative of the FDIC.

Q. And where was that?

A. At 16th and Walnut Streets.

Q. And afterwards where?

(18)

A. Then sometime later we had another meeting at 8th and Chestnut Streets.

Q. Down at the old Integrity Trust office?

A. That's right.

Q. And what took place at those meetings?

A. At the first meeting Mr. Holl went over the general condition of the loan, and he left the impression that it was not their intention——

Q. No, don't give me the impressions. What was said?

A. At that time Mr. Holl went over the various securities and so forth, and he said that he would not disturb the loan in any way, and it was not their intention to do so.

Q. What was discussed?

A. The various collateral and so forth, and payments of interest and assigned fees.

Q. Was anything said about the agreement as to when the loan matured?

A. Not a thing was said.

Q. And what was said at the second conference?

A. That conference dealt primarily with the payment of the assigned fees, he wanted to really know what the status was, and you explained to him just what you expected in the near future, and when you thought you

(19)

would be able to pay——

Q. How long after they took that over, did that take place?

A. I don't recall.

Mr. Aiker: Cross-examine.

CROSS-EXAMINATION.

By Mr. Olmsted:

Q. Where have you worked since 1942?

A. Well, at Budds, E. G. Budd Manufacturing Company. Then I went in business for myself.

Q. That is, you went from Mr. Alker to Budds?

A. That's right.

any conversations in the end of 1936.

Q. When did you leave Mr. Alker?

A. In March, 1942.

Q. And when did you leave Budds?

A. In June, 1945.

Q. Where were you employed, right up here in North Philadelphia?

A. No.

Q. In Philadelphia?

A. Red Lion plant up in Bustleton.

Q. Where did you live at that time?

A. At 4134 Barnett Street.

Q. Do you still live there?

(20)

A. Yes, sir.

Q. Do you know when this conference that you speak of at 16th and Walnut Street took place?

A. I beg your pardon?

Q. Do you know when this conference took place?

A. Not very long after the Integrity was taken over by the FDIC.

Q. Do you remember which room you had your conference in?

A. It was in the room on the right-hand side going in the door, in the corner room.

Q. Are you sure it was Mr. Holl you talked to?

A. I thought it was.

Q. Well, do you stick to that testimony, that it was Mr. Holl?

A. At least I thought it was Mr. Holl. I don't recall whether any changes were made or not.

Q. Were you introduced to him as Mr. Holl?

A. I think I was.

Q. If your recollection could be wrong about that, it could be wrong about the conversation, too?

A. No, sir.

Q. It could not?

A. It may be wrong about the party I spoke to, but the

(21)

conversation I recall clearly.

Q. Now, down at 8th and Chestnut, who did you talk to there?

A. I assume it was Mr. Holl.

Q. Was it the same person?

A. I thought it was. I mean, it has been six, seven years.

Q. Well, six or seven years——

A. Either way, it was a party representing the FDIC whom I spoke to with Mr. Alker.

Q. Well, do you remember whether it was the same person in both cases?

A. I thought it was. I may be wrong there, but as I said before, it was a party representing the FDIC.

Q. It was six or seven years ago?

A. Oh, five years ago.

Q. Five years ago. So that your recollection could be faulty in that regard?

A. That's right, yes, sir.

Q. Mr. Barone, were you subpoenaed to testify in Mr. Alker's case in 1944?

A. No, sir.

Mr. Olmsted: That is all.

Mr. Alker: That is all.

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(22)

CHARLES D. McAVOY, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Alker:

Q. Mr. McAvoy, where do you live?

A. South Ardmore, Delaware County.

Q. Mr. McAvoy, did you in the latter part of 1936 have any conversation with Mr. Semish, the vice-president of the Integrity Trust Company in connection with my loan?

A. Yes, I had occasion to stop in your office on other business and you asked me to deliver a check of interest payment on the loan which you had with the Integrity Trust Company, and I delivered same to Mr. Semish, I presume the vice-president, and he handed the check over to the clerk, and while he was making out the receipt, I said to Mr. Semish, I said, "My God" I said, "that is some interest to pay, isn't it?"

And he said, "It certainly is."

And I said, "Well, what rate is that?"

And he said, "Well, this is presently a five. It was six." He said, "We reduced it on our own accord."

And I said, "Bankers don't generally do that, do they?"

And he said, "Well, Mr. Alker has been a

(23)

friend of the bank. He brought in a great deal of deposit accounts, and he also brought in a lot of title business."

And I said, "Well, how long has this been going on?" I did make a reference about something, which I cannot repeat here, about his income tax return. And we often wondered, I said, down in the office the man would pay that much interest the year. So he said that, he said, "Mr. Alker has had this loan for some years, and we just renewed it for a period of ten years," and he said, "Under no conditions would we sell out the collateral. We had an oral agreement with the other officers and himself, with Mr. Alker, and the Trust Company has a lot of respect for Mr. Alker and knew that he would not let it go to default," and they had an arrangement that they would never sell out the collateral as long as he kept up the interest payments. And I don't know, I made some offhand remark that, I don't know just what I said, I

wouldn't want to carry that load, or something like that, and he said, "We are fully protected; we have an insurance policy of," I think 100 or 125,000, and he said, "He has some good friends," and so on.

Q. He told you definitely that they had extended the loan for ten years?

A. Yes, he said they just had extended it from, I

(24)

think five, previously, to ten.

Q. Did you ever have any other conversations with him?

A. Well, no, I was only in there two or three occasions as I remember, and I only went over there on your account, and then sometimes I went to the Title Company, but I never stopped in.

Mr. Alker: Cross-examine.

CROSS-EXAMINATION.

By Mr. Olmsted:

Q. What was your occupation in 1936?

A. Internal revenue.

Q. Well, what do you mean by that?

A. Well, I mean by that I was employed by internal revenue.

Q. You mean in the federal government?

A. Yes.

Q. At the time you took this over for Mr. Alker, you were an employee of it?

A. United States Internal Revenue, right.

Q. How long did you remain in that?

A. Remain in what?

Q. In the United States Department of Revenue?

A. Well, I am still in the internal revenue. I have been off on a sick leave, understand, for the last four-

(25)

teen months. I had very high blood pressure last week, and I suffered a hemorrhage, but for about three days.

Q. Where is your office?

A. Where is my office? You know where internal revenue is, I hope, in Philadelphia, 9th and Chestnut Streets.

Q. You are not in the Gimbel Building?

A. I am not in either building. I was sick for the past fourteen months. I have been on leave from the United States Internal Revenue, sick leave. Prior to that I worked out of the 69th Street office for the last two years. In 1936 I was employed as an auditor, income tax division, internal revenue, 9th and Chestnut Streets.

Q. And when were you at 69th Street?

A. About two years before my fourteen months off. You figure that out.

Q. That would be from 1943 to 1945?

A. Pardon me?

Q. That would be from 1943 to 1945?

A. It is May 19, 1945, I was taken sick with the stroke, was paralyzed.

Q. And for about two years before that you were——

A. Stationed—approximately two years before that, stationed at 69th Street.

Q. Where at 69th Street?

(26)

A. The McClatchey Building, Room 417, assigned a deputy in the field. I worked in internal revenue since 1933, and prior to that I have served under the Woodrow Wilson administration for a couple of years.

Q. Were you subpoenaed in this case?

A. I was threatened to be subpoenaed.

Q. Well, were you subpoenaed?

A. No, but I was going to be subpoenaed if I didn't.

Q. No; I don't mean for this testimony today.

A. Oh.

Q. No, I mean back in 1944.

A. In 1944 what?

Q. Were you subpoenaed to testify in this case?

A. No.

Q. Have you ever communicated with anybody in the FDIC about this case?

A. I spoke to nobody in the FDIC. I spoke to your associate or employer, whatever he is, Mr. Saul.

Q. Anybody else?

A. And then he put you on the phone, I spoke to you.

Q. Anybody else?

A. Now, let me think. I mean if I spoke to anybody else in your office?

Q. Well, in the FDIC, I am talking about now.

(27)

A. I spoke to Mr. Holl on occasions, but in regards to Mr. Alker. I spoke—if you want to know, I will tell you—I spoke to him on the sale of the property and where they squeezed it out——

Q. It didn't concern Mr. Alker?

A. No, it didn't have anything to do with this.

Q. Did you speak with anybody in the FDIC concerning Mr. Alker's matter?

A. Not that I recall. In fact, I don't know anybody down at FDIC personally.

Mr. Olmsted: That is all.

RE-DIRECT EXAMINATION.

By Mr. Alker:

Q. Your family has been a client of our office for quite some years, isn't that a fact?

A. Oh, definitely, and besides, Mr. Alker has been very helpful to friends of mine when they needed mortgages and

so on, and went over the Integrity on settlements. I recall quite a few properties.

Q. You had occasion from time to time——

A. To stop in and see you in regards to those mortgages, I merely went up there, and Mr. Alker would chase anybody out on an errand, if he was busy.

Q. You just happened to be there when I asked you to take it over; there was nobody else to take it?

(28)

A. That's right.

Mr. Alker: Cross-examine.

RE-CROSS-EXAMINATION.

By Mr. Olmsted:

Q. Mr. McAvoy, you say you talked to me about the case?

A. On the phone, I wanted that understood. I spoke to Mr. Saul.

Q. What did you say?

A. Oh, I don't know, I think I called you all the bastards in the world and you called me all the bastards in the world. I think that is the conversation, generally, I think it was.

Q. The first part is true, but not the second part. Didn't you threaten me?

A. Threaten you? God damn it, you were threatening everybody. You were holding the cards, not me. How could I threaten you?

Q. All right.

A. But I did ask Mr. Saul to do us a favor and take it easy on account of bygone days, I did. Then he turned me over to you, and that was that. But I don't remember any conversation we had except asking for further indulgence in the collection of those, I think dividends.

(29)

wasn't it? It was around March 15th one year, and I couldn't even leave the office; just we were standing up there at the counter and busy as the devil. I apologize for my part of the bastards.

Q. If it would interest you, it is a word I don't use.

A. Oh, pardon me. Well, you might have said son of a bitch, then. I don't know what it was.

(Discussion off the record.)

Mr. Olmsted: I have not objected to any of the testimony on the ground of admissibility or the impropriety of the motion which has been made, and in support of which this testimony is being taken, on the theory that the proper place to make such objections are when they are offered in Court. I think it well to make it clear at this point that I am not waiving these objections, as to me it seems very clear that all of this is entirely incompetent.

Mr. McCracken: Well, that is thoroughly understood.

DEPOSITION OF CHARLES B. MATSINGER AND JOHN PELLINI, DATED JANUARY 16, 1947.

(31)

CHARLES B. MATSINGER, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Alker:

Q. What is your name?

A. Charles B. Matsinger.

Q. What is your present address?

A. Residence or business?

Q. Business.

A. 360 North Hampton Street, Easton.

Q. What was your occupation in 1937 and 1938?

A. State bank examiner.

Q. Did you at that time during any of those years in the 30's examine the Integrity Trust Company?

A. Sometime in the late 30's. I wouldn't want to be positive of the year.

Q. How many years did you make the examination? Just the one?

A. No, either two or three.

Q. Were you familiar with the loan of Harry J. Alker, Junior, at the bank at that time?

A. There were such loans there at that time.

Q. Did you have any discussion about that loan with any of the officers of the bank?

A. Yes.

(32)

Q. Do you remember who the officers were?

A. I wouldn't want to say definitely, but we discussed things of that kind with Mr. Brown, Mr. Semish and possibly Mr. Hogan.

Q. Do you remember whether or not there was brought to your attention any agreement of mine with the trust company relating to that loan?

A. As far as I can recall now in our discussions with the officers they gave us information that would lead us to believe they had some——

Mr. Olmsted: Wait a minute. Just a minute. You aren't answering Mr. Alker's question. Just start again and don't state hearsay. Just state what you know and what you did.

The Witness: What I say, as far as I can recall, in discussing those loans with them, they indicated that there was some sort or kind of agreement between them.

By Mr. Alker:

Q. Did you report that to the state in your report?

A. Well, I can't tell you just exactly what was in the reports now, but I would believe that there would be reference to that in our reports.

Q. You do know that they did state to you that there was some sort of an agreement relating to my loan?

(33)

Mr. Olmsted: Objected to as leading.

Mr. Alker: Of course we couldn't expect you eight years later to remember the details.

Mr. Olmsted: I also object to the other one as not being the best evidence. The report itself would be the best evidence.

Mr. Alker: You can't get those.

Mr. Olmsted: You can subpoena those.

Mr. Alker: I was told you couldn't. I have been trying to.

(The following question was read by the Reporter: "Question: You do know that they did state to you that there was some sort of an agreement relating to my loan?")

Mr. Olmsted: Objected to as leading.

A. Do you want me to answer that?
Q. Yes, sir.
A. To the best of my knowledge, I believe they did.
Q Do you remember what they said to you?
A. No, I couldn't.
Q. I don't mean in plain words, but substantially what they advised you.
A. No, that would be impossible for me to remember that now.
Q. What led up to the discussion?

(34)

A. In the course of an examination the examiners were supposed to take up with the officers and discuss all loans. The only reason that I can remember that loan now is that it was an awfully large sized one. We discussed all loans with the officers and got all information that it was possible to get.
Q. Did you notice anything different between the collateral of this loan and any other loan? I mean, do you recall?
A. I can't even recall what collateral was there now.
Q. Did you discuss with the officers of the bank each loan as to which there was any question in your mind?
A. We always did.
Q. You don't know me, of course?
A. No.

Q. I mean I never met you before this?

A. No.

CROSS-EXAMINATION.

By Mr. Olmsted:

Q. Where do you now live?

A. My residence?

Q. Yes.

A. 227 West Lafayette Street, Easton.

Q. How long were you in the State Banking Department?

A. From November 1, 1929, to November 15, 1943.

(35)

Q. Where did you live in 1943?

A. Prior to my moving to Easton I lived at 4835 Morris Street, Germantown.

Q. Philadelphia?

A. Yes.

Q. Where did you live in 1943? Will you state that more specifically?

A. 1943?

Q. Yes.

A. At the Morris Street address, 4835.

Q. When did you move to Easton?

A. I went to Easton November 15, 1943, and my family moved there on January 17, 1944.

Q. You have lived there continuously since then?

A. Yes, sir.

Q. What is your present occupation?

A. Executive vice-president of the Lafayette Trust Company.

Q. At 360 North Hampton Street is the address?

A. Is the business address.

Q. Is the address of the Lafayette Trust Company the Hampton Street address?

A. Yes.

Q. You don't remember whether you talked to Mr. Semish, Mr. Brown or someone else?

(36)

A. No, I couldn't tell you which one.

Q. Mr. Semish didn't say that he had made any arrangement with Mr. Alker, did he?

A. I can't tell you if anyone said definitely, but in our conversations the fact of an agreement of some kind was brought up, and who said it I wouldn't be able to tell you today.

Q. At page 271a of the printed record, folio 302, appears the following: This is a question addressed to Mr. Semish and his answer.

> "Q. Did you at any time have any conversations with Mr. Alker or Mr. Fisher concerning the calling of the loan or the selling of the collateral?
>
> "A. I never did."

Did Mr. Semish tell you anything inconsistent with that testimony?

A. That I couldn't answer.

Q. You don't remember that he did?

A. I don't remember he did and I don't remember he didn't.

Q. At page 273a of the printed record appears the following question addressed to Mr. Brown and his answer:

> "Q. Yes, and was there any reference made at that time to an alleged agreement concerning the sale of the collateral?
>
> "A. There is no agreement insofar as I could

(37)

> ascertain by having asked Mr. Hart specifically about it. There were no indications in the records among the assets or with respect to this particular note as to any agreement existing."

Did Mr. Brown tell you anything inconsistent with that testimony?

A. There again I can't answer you. I can't remember who said it at the time.

Q. Did you find any written reference in the records of the bank about any agreement concerning Mr. Alker's loan?

A. Again I can't remember of anything. It has been too long ago.

Q. You cannot remember whether or not you did find anything?

A. No.

Q. If you had found anything you would have reported it in your report, wouldn't you?

A. If it were pertinent information?

Q. Yes.

A. It would be reported.

Q. What became of your report after you completed it?

A. Sent to Harrisburg.

Q. Did you have anything more to do with it after that?

A. No.

Q. You signed it, I presume?

(38)

A. I signed it after it was typed. After it was all typed and signed and sent to Harrisburg that is the end of it, as far as the examiners are concerned.

Q. Were you subpenaed to testify in this case?

A. When?

Q. In 1944.

A. No.

Q. Were you subpenaed to testify at this time?

A. Mr. Alker asked me if I would appear here today.

Q. He didn't ask you to do that in 1944?

A. No.

Mr. Alker: I didn't know he existed.

Mr. Olmsted: That is all.

RE-DIRECT EXAMINATION.

By Mr. Alker:

Q. Mr. Brown on page 273a in answer to a question by Mr. Olmsted, "Did you discuss this matter with the bank examiners?

"A. I did."

Could you have been one of the examiners with whom he discussed it? He was asked, "Did you yourself make any such agreement?"

He said, "I never did."

Of course the agreement wasn't made by him.

(39)

"Did you discuss this matter with the bank examiners?

"Answer: I did."

Could you have been one of the examiners he was referring to then or couldn't you tell at this time?

A. I don't know what Mr. Brown had in his mind.

Q. I mean the examiners. How many examiners were there?

A. As far as the examinations were concerned there would be only one representing the state and one representing the Federal Reserve Bank in Philadelphia and in those years, in the years that I was there I would be the one he would be referring to.

Q. That is right. If it wasn't one of those years when you wouldn't be?

A. That is right.

Mr. Alker: That is all.

RE-CROSS-EXAMINATION.

By Mr. Olmsted:

Q. Just while you are on that, the next question after the one Mr. Alker read to you is as follows:

"Q. Did you tell the bank examiner that there was such an agreement?

"A. I never did."

Now, are you testifying in contradiction to that

(40)

that Mr. Brown did tell you there was an agreement?

A. I wouldn't want to say that Mr. Brown told us definitely that there was an agreement.

Q. Have you read the testimony in this case?

A. No, sir.

Q. You aren't familiar with the testimony that was given by the other bank examiners?

A. I didn't know there was even a case came to trial on it.

Q. Do you know Mr. George I. Taylor?

A. George Taylor?

Q. Charles I. Taylor.

A. Yes.

Q. Do you know him?

A. Yes.

Q. Did you make any examinations of the Integrity Trust Company along with him?

A. Yes, I believe that was made in 1940.

Q. Did you join in the examination on the basis of which the Integrity Trust Company was closed?

A. Yes.

Q. Do you know Mr. Hobart B. Dietz?

A. Yes.

Q. Did you make any examinations with him into the Integrity Trust Company?

(41)

A. I believe I did.

Q. Do you know Mr. Martin J. Levin?

A. Yes.

Q. Did you make any bank examinations of the Integrity Trust Company in company with him?

A. Yes.

Q. Are you familiar with the fact that all three of them testified that they found no reference to this among the written records of the bank?

Mr. Alker: I object to that.

Mr. Olmsted: Just a minute.

Q. (Continuing) —and that nothing was said to them about this alleged agreement at the time they interviewed the officers of the bank?

Mr. Alker: I object to that because the testimony doesn't so state.

A. I don't know anything they may have said because this is the first time that I have known—just a few days ago is the first knowledge I had of any case, law suit or anything else concerning this loan.

Q. Mr. Alker didn't let you see this testimony before you came here?

A. No, sir.

Q. You mean to contradict the testimony that they gave?

(42)

Mr. Alker: I object to that because the testimony doesn't so show.

A. I haven't said that I saw a written agreement or anything at all in regard to any writing either on the records or presented by any officer of the Integrity Trust

Company. I simply said that in discussing this loan—the only place that I said anything at all concerning any agreement was that in discussing this loan the officers verbally indicated that there was some agreement with Mr. Alker. What that agreement is I don't know now.

Mr. Olmsted: That is all.

JOHN PELLINI, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Alker:

Q. What is your name?

A. John Pellini.

Q. What is your address?

A. My present address is 223 East Main Street, Pennsgrove, New Jersey.

Q. Where were you employed in 1937 or some years before and some years afterwards?

A. From 1934 to 1943 I was employed by Mr. Alker.

Q. In what capacity?

(43)

A. Well, I started out as a runner there and I finally wound up as officer manager taking care of the books, paying all bills, and all general office work.

Q. Did you on any occasions go to the Integrity Trust Company in reference to my loan?

A. Yes, sir, I did, on many occasions. Mr. Perrone and I both used to go. If he was busy on something I would go to the Integrity to pay the note, which was every month.

Q. Pay the interest?

A. That is right, sir, pay the interest on that note.

Q. Did you know any of the officers over there?

A. Oh, yes, I knew Mr. Brown, Mr. Winterbottom,—he was up in the real estate department—Mr. Conger, Mr. Semish.

Q. Did you have any conversations with any of those officers about my loan about 1937?

A. Yes, I did, with Mr. Semish, because he was the man I used to take the check to, and he would give it to a clerk to go in and get my receipt, and quite often I would sit and talk to him, and I can recall a number of times I told him it was quite a heavy load that Mr. Alker was carrying. He said it was, but they had a lot of faith in Mr. Alker for the simple reason he had been paying his interest. He had an insurance policy. He had some sort of collateral against the loan. They had faith in him for the simple reason they

(44)

knew Mr. Alker would eventually pay it off as soon as the market became better. We used to talk about that because the interest was so large, about $2,500 a month plus the insurance I used to pay as collateral on that loan. As I can recall there was one insurance which had been extended from 1936 to 1946 which Mr. Semish had told me about, because I told him we were still paying the premium on it.

He said, "Yes, the insurance policy had been renewed for the simple reason they had agreed to continue the loan of Mr. Alker, to extend it, a continuation for ten more years. That is why they had renewed that policy. I was kind of happy about the whole thing because I knew how hard it was for Mr. Alker at times to get up that $2,500 a month.

Q. Did you know the date to which he said the loan was extended?

A. I think that was about 1937. He said it would go to 1946. It would go for ten more years.

Q. Where have you been since February 1, 1943?

A. I have been in the army from about the first week of February up until the end of 1945.

Q. Where were you?

A. I was overseas most of the time.

Q. You just got back in 1945?

A. That is right, sir.

(45)

CROSS-EXAMINATION.

By Mr. Olmsted:

Q. Did you say you kept Mr. Alker's books?

A. John Perrone kept most of the books and I helped him on the books. Mr. Perrone left in 1941 and I continued on from there on in.

Q. Were you familiar with the books?

A. I was quite familiar with them.

Q. It was a fact that the dividends that Mr. Alker received from the stocks that were pledged as collateral exceeded the amount of the interest?

A. Not that I know of.

Q. You don't know whether it is so or not?

A. No, I don't because I never for the simple reason —what stocks do you mean? The stocks that were pledged as collateral?

Mr. Olmsted: I would like the record to show that Mr. Alker spoke to this witness in the middle of his answer.

By Mr. Olmsted:

Q. Don't pay any attention to Mr. Alker's statement and listen to me. You said you were office manager at the end and kept the books.

A. Yes, to a certain extent.

Q. Are you familiar with the dividends that were payable to

(46)

Mr. Alker?

A. No, not all of them, no, sir. I wasn't familiar. At the present I couldn't remember, to be truthful with you, about those dividends.

Q. You don't know then whether or not the dividends that he received were greater or less than the amount of interest that he paid?

A. No. I wouldn't know, sir.

Q. Did you make out his income tax return?

A. No, sir, I didn't. He took care of them himself.

Mr. Olmsted: That is all.

EXCERPT FROM DEPOSITION OF JOHN M. PELLINI DATED JANUARY 26, 1962.

(5)

JOHN M. PELLINI, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Taylor:

Q. What is your full and correct name?

A. John M. Pellini.

Q. Where do you reside?

A. 828 North 63rd Street.

Q. Are you employed?

A. Yes, I am.

Q. And what is your employment?

A. I am a heavy construction equipment salesman.

Q. By whom are you employed?

A. Service Supply Corporation, 20th and Erie Avenue.

Q. How long have you been employed by this firm?

A. About a year.

Q. And previous to that employment by whom were you employed?

A. I was on my own as an equipment broker.

Q. And before you went into business for yourself by whom were you employed?

A. How far back do you want me to go?

Q. Well, I want to go back to when you were discharged from the Army.

A. Well, I was dicharged from the Army——

(6)

Q. Well, before you went into business for yourself.

A. Before I went into business I was employed by Mr. Alker.

Q. You mean Harry J. Alker, Jr., one of the defendants in this case?

A. Yes, sir.

Q. When were you first employed by Mr. Alker?

A. 1934.

Q. And what were your duties then?

A. I was assistant to John Barone who was the office manager.

Q. What were your duties?

A. General office work with John on the books, taking care of the books, making all deposits and general work running the City Hall and taking care of Mr. Alker's personal problems. Things of that sort as an assistant to John handling all of Mr. Alker's matters pertaining to the office and personal.

Q. How long were you in Mr. Alker's employ?

A. How long was I?

Q. Yes.

A. I went into service in February '43. From '34 to '43.

Q. You went from his employment right into service?

A. That's right, sir.

Q. What service were you in?

A. United States Army.

Q. Can you tell us what part of the Army you were in?

(7)

A. Yes. I was in a service supply outfit overseas until August '45.

Q. When did you go overseas?

A. I went overseas in '43. I think it was October or November, November '43.

Q. And you were not in the United States or available to be a witness at this trial in April 1944, at the trial of this case?

A. No.

Q. Were you hororably discharged from the Army?

A. Yes.

Q. When?

A. September '45.

Q. And did you go right back to employment with anyone?

A. Yes, right back with Mr. Alker.

Q. And how long did you work with him then?

A. With Mr. Alker until about '50, 1950, and went out on my own for two years. Then Mr. Alker asked me to come back with him and I was back here until '57. I think it was '57.

Q. What is your age?

A. 48.

Q. Pursuant to your duties with Mr. Alker in Mr. Alker's employment did you have anything to do with any loans of his?

A. Yes.

(8)

Q. Will you tell us?

A. Well, in particular I used to make the payment, interest payment, every month to the Integrity Trust Company.

Q. Whose loan was this?

A. Personal loan of Mr. Alker's.

Q. Will you tell us what you know about that?

A. I used to take over the interest on that loan every month in the neighborhood—it used to range from $2,200 to $2,500 every month. It was the interest of his personal loan with Integrity.

Q. Do you know how much the loan or loans were?

A. I think it was around a half million dollars, in that neighborhood.

Q. What else did you do about it?

A. Well, I knew the question came up for the renewal of the notes, the renewal of the loan.

Q. Tell us how you knew it and what you knew, and when.

A. Well, in that particular that was—the original loan was made—I wasn't here when the original was made in '31. He called me in.

Q. Who?

A. Mr. Alker called John Barone and I into the office and told us that the bank examiners wanted new notes made up over there on the loan.

(9)

Q. Over where?

A. At Integrity Trust Company. He had told me to go over to pick up the new notes, to bring them here to the office so he could sign them.

Q. Was it note or notes?

A. Note.

Q. When you went over there what transpired and who did you see if you remember?

A. Well, it was the assistant to the president there. He used to sit right outside of the president's office. The president at that time used to be Semich.

Q. Was he president?

A. I don't remember if he was president. At this time I am fairly certain he was president.

Mr. White: Do you want to spell the name.

A. S-e-m-i-c-h, I think.

By Mr. Taylor:

Q. Can you locate the office in the building?

A. Yes. As you went into the building it was on the right-hand side there.

Q. On the first floor?

A. First floor, that's right.

Q. Where was the office located?

A. On the right-hand side.

(10)

Q. In the corner?

A. In the corner.

Q. I don't mean to lead.

A. No, in a corner there. In other words, as you went in on the right-hand side, on your right-hand side back in this corner.

Q. This is at 16th and Walnut?

A. That's right.

Q. Did you go into the main office, or who did you see?

A. I had gone in to see—I brought it in to the president. Mr. Alker gave me instructions to go in to pick up the note from the president, and he sent me outside to his assistant.

Q. And was that Semich, the assistant, or if you don't remember or don't recollect don't give a name.

A. I don't remember who it was, but I knew it was the president because he told me to go direct.

Q. But you dealt with the man outside?

A. That's right.

Q. Could you recognize that man if you ever saw him?

A. Probably could. It has been years, but I used to see him so frequently. I used to be over there on the minimum twice a day at the Integrity.

Q. What occurred on this visit?

A. I was to pick up the new note.

(11)

Q. Can you give us a date?

A. That was in '36, around December '36. I was to pick up a new note. The bank examiners wanted that new note, I sat down there talking to him and he didn't have the new note prepared.

Q. You mean the man outside?

A. Yes, the president's assistant there. I happened to see the old notes were there. I saw those and he said he would have the new notes made up and I had to wait while they were filled in, the new note. So, I picked that up. He

gave it to me and I took it over here to Mr. Alker for his signature.

Q. Did you read the note?

A. Yes, I read the note.

Q. Did you examine it?

A. Yes.

Q. How much was it for, if you remember?

A. It was over $500,000 I know that.

Q. Do you remember any wording on it?

A. I do remember the notations on the note itself because there was a list of collateral and notation on the back about Walter K. Hardt on an agreement, in regards to an agreement they had with Walter K. Hardt who used to be president one time of the Integrity when the original loan was granted.

Q. This was the original note?

A. Yes.

(12)

Q. That Mr. Alker signed or executed in 1931, I assume.

A. Yes.

Mr. Bull: No, he is talking about the note he brought back.

A. Yes, the note I brought back.

Mr. Taylor: I withdraw that.

By Mr. Taylor:

Q. What did you do with the new note?

A. I took it to Mr. Alker. He signed it, and I took it down and showed it to A. A. Du Ban downstairs.

Q. May I ask you this before you talk about that? Did you have any conversation with the man that gave you the note about the contents?

A. Yes. I asked him if everything was all right as to collateral and he said, yes. Everything is all right. I said,

what happens on the insurance? Is the Integrity renewing the insurance because I knew there was quite a policy on that, a term policy. He said, yes. They had ordered the insurance from Mr. Santa Maria, a ten-year policy. Therefore, the note would continue the same along with the insurance policy.

Q. Did you have any conversation with that man?

A. Oh, yes.

Q. About what was typed on the note?

A. Oh, yes, as to regards—I had said to him that note

(13)

there, the old note had the list of collateral plus the notations on it. There were notations on the back as to an agreement because Mr. Alker had definitely impressed me with that that everything had to be on the new note also.

Q. Did you see the old note at that time?

A. Yes, sir, I did.

Q. And that was on the old notes?

A. Yes, sir, on both notes. It had been put on the new note. I examined it before I walked away from his desk.

Q. Do you know if it was done at that time?

A. Well, I had to sit there and wait for it. So, no doubt it was done at that time.

Q. You are only concluding now. Do you know? Did you see it put on there?

A. Well, it had been on the new note when it was given to me to take to Mr. Alker.

Q. How about the old notes?

A. The same notation was on the old notes, whatever notations were on the back and all.

Mr. Taylor: Here are photostats. The originals are filed in Court. I will attach them to the deposition.

Mr. Bull: I think that is within the scope of the objection which we reserved.

(14)

Mr. Taylor: All right.

By Mr. Taylor:

Q. I show you two photostatic instruments, or photographed instruments. Do they help refresh your memory, or do you know what they are?

A. Yes, I certainly do. These are the old notes.

Q. They are the old notes, or copies?

A. They are copies, photostats of the old note.

Q. And can you read what is on the back of the notes?

A. This is a list of payments, deductions. The collateral plus the notation, Mr. Alker's signature on the back there plus, "For additional collateral and agreement with Alker and A. A. Du Ban see WKH "

Q. That is on each of the notes?

A. It is on the back of just one of them.

Q. Isn't it on the other one?

A. Yes. It is on the other one also where the collateral is listed.

Q. Was that wording on the notes when you saw them in the bank's office?

A. Yes, sir, because I happened to know why that was on there because it was Mr. Du Ban's collateral. It was Mr. Du Ban's stock.

Q. Did you have any conversation with anyone at the bank

(15)

about the wording?

A. Yes, sir. I did because I knew that was very important. It had to be on the new notes. What was here on the old notes here had to be on the new one.

Q. With whom did you have conversation?

A. That is the assistant there. The president's assistant when I went in to pick up the new note.

Q. What was your conversation?

A. The conversation as to the wording there and as to the insurance policy.

Q. Did he tell you why it was there?

A. Yes. He said it had been put there because of the additional collateral and agreement made with Walter K. Hardt.

Q. Who was he?

A. President at the time that agreement was made.

Q. You brought the new note back to Mr. Alker's office?

A. That's right.

Q. Then what happened?

A. Mr. Alker signed it and I was to take it back to the bank, but first to take it down and show it to Mr. Du Ban.

Q. Who told you to do that?

A. Mr. Alker, and I took it and showed it to Mr. Du Ban. He O. K.'d it, said everything was in shape the way it should be, and I took it back to the bank and gave it to the assistant who

(16)

had given it to me to be signed. I asked for the old notes and he said he had put the old notes away. I was in a bit of a quandary for a while. I didn't want to leave the new note and he have the old one, but knowing the amount of business going back and forth between our office and the bank I knew they would send us the note, or I would pick it up.

Q. As the result of that what did you do?

A. Well, I came back and I told Mr. Alker that I did not have the old notes because they had put the old notes away. Everything was O. K. I had delivered the new note, and he told me the insurance policy had been ordered through Santa Maria, a ten-year term policy. I made a notation with Mr. Alker on my own records to follow up to get him back the old notes.

Q. Note or notes?

A. Note.

Q. The old note?

A. The old note, that's right.

Q. Were there one or two notes?

A. There were two.

Q. And as far as you are concerned, and the best of your recollection, these are exact copies of the notes as they were returned to Mr. Alker?

A. Yes.

Q. Now, did Mr. Alker ever receive the old notes?

(17)

A. Yes, we received them.

Q. Who received them?

A. They came in the mail. I always opened his mail every morning at 8:00 o'clock, and had it ready for him. To be truthful I was pestering about these notes because I knew I was responsible for getting the old note back. It finally came in the mail about five or six weeks later.

Q. When would that——

A. That would be in the middle of January or so '37.

Q. Some time in January?

A. Right.

Q. You say you opened the mail?

A. Every morning, yes, sir.

Q. And the notes were in the mail?

A. Yes, sir.

Q. What did you do with them?

A. I put those on top and waited until he came in, and I showed him the notes, the old notes were back and I was filing them.

Q. Did he examine them? Did you examine them?

A. Yes, sir. He examined them and I examined them.

Q. And that is the way they were?

A. That is exactly the way they were.

Q. What did you do with them?

(18)

A. Well, I filed them, and inadvertently I was the guy that caused all the trouble, no doubt. Mr. Alker's file was No. 1, File A. We had an adoption file in front of his, and that is where I put them by mistake.

Q. That would be some time in the latter part of January 1937?

A. '37, that's right, sir.

Q. And then what happened?

A. We went on our normal business, kept making the payment of the interest to the bank every month.

Q. Then what happened?

A. Then in '43 I went into the service.

Q. Nothing else happened as to the notes?

A. No, nothing else occurred. I just put them in the file.

Q. Then you went in the service, and then what?

A. While I was in the service Mr. Alker wrote me that the F. D. I. C. had closed him out. There was nothing I could do about it. I was overseas. In fact I used to get my mail maybe two or three months late. Many a time I didn't get paid for two months. They couldn't catch up with us. As soon as I got back I came in to see Mr. Alker and he told me about the suit being on with the F. D. I. C. We had to find the old notes. So, I went to work on it and I couldn't find the old notes around here because we always used to close out our file, the dead

(19)

files, and take them up to Norristown and put them in storage up there. I spent about a week up in Norristown and found the old notes in the adoption file.

Q. What did you do with them?

A. Immediately brought them in to Mr. Alker.

Q. And is this the first time you have been examined on them in a deposition?

A. No. There was one other deposition before.

Q. That is the one that Mr. Bull referred to?

A. Yes, sir.

Q. You weren't examined as to the notes though, were you?

A. The notes themselves, no, sir.

Q. What was your rank in the Navy? You were in the Navy or Army?

A. Army.

Q. What was your rating or rank?

A. I was discharged as a corporal. I was in the service in 1931 and I was in a military college. We were a military intelligence group.

Mr. Taylor: That's all.

CROSS-EXAMINATION.

By Mr. Bull:

Q. How long ago was it, Mr. Pellini, that this episode to which you have just testified took place? Did you figure it

(20).

out?

A. Which episode is that, sir?

Q. The exchange of the old notes for the new notes, it was in '36?

A. Well, that was in '36.

Q. That is 25 years?

A. Yes, sir.

Q. And what have you refreshed your recollection of this transaction from?

A. By the affidavit I had taken, sir.

Q. In other words, you read over your old affidavit?

A. Oh, yes, sir.

Q. And it is on the basis of that you are giving your present testimony?

A. Yes. It refreshed it because—it was such a large amount of money and knowing that the F. D. I. C. case was going on all the time while I was here—it was kept fresh in my memory. Let me put it that way.

Q. And you worked with Mr. Alker off and on until——

A. '57, sir.

Q. —'57?

A. Yes.

Q. And have you seen him since occasionally, kept up with him?

(21)

A. Yes, I have occasionally, sir.

Q. And you have discussed this deposition with him?

A. No, not the deposition. The only thing I discussed, he asked me if I remember my affidavit. I said, yes. I remember my affidavit.

Q. Who suggested that you search for the old notes?

A. Ed Hall.

Q. And approximately when was this?

A. Well, I didn't come back into the office until the latter part of '45 or the first month of '46. The latter part of '45 because I took about a month or so off before coming back to work, but I know I didn't find those doggone notes for six months or so. I went through every file in Norristown, every individual file I went through. I knew it was important. That was my orders, find those notes. They had been filed and that was it. I went through every blessed file in that building.

Q. And it was by going through every file that you finally found it?

A. That's right, and I found it in the adoption file.

Q. And when you say in Norristown that was in Mr. Alker's house in Norristown?

A. Yes, sir. That is where we stored the old records, all the old files.

Q. You think this was about six months after you came back

(22)

in '45?

A. It might have been a little longer, more like a year. Right around a year's time. I know it was no sooner than six months, and more like a year.

Q. You were discharged, you say, in September?

A. '45, sir.

Q. So, you would say this had been found about September of '46?

A. No, no. A couple of years intervening there. I am of the opinion, if I can recall correctly, because I couldn't spend all my time out there. I used to go out there maybe a day a week, or on a Sunday. It might have been within a couple of years by the time I went through all those files.

Q. What did you do, go through every file?

A. Every blessed file I went through.

Q. Did you start with Mr. Alker's file?

A. Yes. I started with Mr. Alker's file and I went through all the estates, everything, every file over there. The adoption file was, from what I can recall, the adoption file was back and forth. I know they still do it. He used to before sometimes we would bring in old files and usually if you are looking for something it is the last thing you look through and you find it. Mr. Alker had two files. He had a personal file and a business file. His business file was 788. That has

(23)

always been his file. Then he had a personal file. Anything pertaining to him, himself personally, went into his file, Alker file.

Q. You are a great admirer of Mr. Alker's, aren't you?

A. To be truthful with you I respect him as a man, but I don't respect him as a businessman.

Q. You would do anything you could for him, wouldn't you?

A. No, sir, anything within reason. That's about all.

Mr. Bull: May I see the affidavit?

Mr. Taylor: Yes.

Mr. Bull: I should like at this time to renew my objection to the taking of the testimony on the ground that the testimony which has just been given is based upon and exactly on the subject matter of the affidavit already in the record, and is also on the same general subject matter which was covered in the previous depositions. That is to say the transactions relating to the notes and his knowledge of the notes.

Mr. Taylor: All right.

RE-DIRECT EXAMINATION.

By Mr. Taylor:

Q. Now, how many rooms are there in Mr. Alker's house, if you know?

A. About 12.

(24)

Q. And how many rooms, how many of those rooms contain files?

A. I would say about four, and he used to have some down the basement which I raised hell about because they were getting moldy down there and I had to bring them up.

Q. Did the house have a garage?

A. Yes.

Q. Were there any files in the garage?

A. Yes. There were files out there one time also.

Mr. Taylor: I would like to offer these photostatic notes for the deposition.

Mr. Bull: They are already in the record, Mr. Taylor, are they not?

Mr. Taylor: Yes, they are. I will withdraw them. You recognize them as being in the record?

Mr. Bull: It is my understanding they are in the record.

Mr. White: I suppose since the witness, although over objection, has referred to them they better go in.

Mr. Bull: Yes.

Mr. Taylor: All right.

Mr. Bull: For the purposes of convenience let's put the affidavit in.

Mr. Taylor: Also put in the affidavit of John Pellini dated August 9, 1949.

(25)

Mr. White: Can we identify that as the paper from which the witness refreshed his recollection according to his testimony?

Mr. Bull: That's right.

Mr. Taylor: We agree it is the same affidavit.

Mr. Bull: This is the paper from which you have refreshed your recollection, is that right?

A. Yes.

Mr. Taylor: Is that the only matter from which you have refreshed your recollection?

A. Yes. That is about it.

Mr. Taylor: That's all.

Mr. Bull: That's all.

(Examination concluded at 10:40 A. M.)

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

(Filed March 27, 1963)

Per Curiam:

On review of the record we find no error. The District Court's denial of appellants' motion for new trial will be affirmed for the reasons so well stated by Judge Layton in his opinion filed June 20, 1962 and his Memorandum Opinion filed July 12, 1962.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of July 12, 1962 of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF,
Clerk.

March 27, 1963.

RECEIVED AND FILED
Mar 27 1963
IDA O. CRESKOFF
CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Civil Action No. 3047.

FEDERAL DEPOSIT INSURANCE CORPORATION TO THE USE OF SECRETARY OF BANKING, RECEIVER OF INTEGRITY TRUST COMPANY, TO THE USE OF BUTCHER & SHERRERD AND FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE,

v.

HARRY J. ALKER, JR., AND MAMIE DU BAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DUBAN, DECD.

ORDER:

AND NOW, to wit, this 22nd day of November, 1961, upon consideration of the motion of Harry J. Alker, Jr., dated November 15, 1961 (Docket Paper No. 181), appearing pro se, to reopen the case and place his motion for a new trial in the above entitled action (referred to in Federal Deposit Insurance Corporation v. Alker, 234 F. 2d 113, at page 117) on the Argument List; together with a petition to take depositions of witnesses in support thereof whose testimony is not already in the record, it is ORDERED, ADJUDGED AND DECREED that said motion to reopen the case and place upon the Argument List his motion for a new trial be and it is hereby GRANTED; depositions of any witnesses whose testimony is not already in the record to be taken and completed on or before January 15, 1962, and the motion thereafter to be

promptly listed for argument upon special application to the Honorable Caleb R. Layton, III, United States District Judge of Delaware, specially assigned to hear and dispose of said motion.

By THE COURT:

/s/ THOMAS J. CLARY, *Ch. J.*

FEDERAL RULE 60(b).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, release, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946, eff. March 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.

12 U. S. C. A. § 1821(g).

(g) In the case of a closed national bank or District bank, the Corporation, upon the payment to any depositor as provided in subsection (f) of this section, shall be subrogated to all rights of the depositor against the closed bank to the extent of such payment. In the case of any other closed insured bank, the Corporation shall not make any payment to any depositor until the right of the Corporation to be subrogated to the rights of such depositor on the same basis as provided in the case of a closed national bank under this chapter shall have been recognized either by express provision of State law, by allowance of claims by the authority having supervision of such bank, by assignment of claims by depositors, or by any other effective method. In the case of any closed insured bank, such subrogation shall include the right on the part of the Corporation to receive the same dividends from the proceeds of the assets of such closed bank and recoveries on account of stockholders' liability as would have been payable to the depositor on a claim for the insured deposit, but such depositor shall retain his claim for any uninsured portion of his deposit: Provided, That, with respect to any bank which closes after May 25, 1938, the Corporation shall waive, in favor only of any person against whom stockholders' individual liability may be asserted, any claim on account of such liability in excess of the liability, if any, to the bank or its creditors, for the amount unpaid upon his stock in such bank; but any such waiver shall be effected in such manner and on such terms and conditions as will not increase recoveries or dividends on account of claims to which the Corporation is not subrogated: Provided further, That the rights of depositors and other creditors of any State bank shall be determined in accordance with the applicable provisions of State law.

Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1963

No. 342.

FEDERAL DEPOSIT INSURANCE CORPORATION, TO THE USE OF SECRETARY OF BANKING, RECEIVER OF INTEGRITY TRUST COMANY, TO THE USE OF BUTCHER & SHERRERD, AND FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE,

Respondents,

v.

HARRY J. ALKER, JR. AND MAMIE DUBAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DUBAN, DECEASED,

Petitioners.

Respondents' Brief in Opposition to Petition for Allowance of Writ of Certiorari to the United States Court of Appeals for the Third Circuit and Appendix.

W. WILSON WHITE
RICHARD C. BULL
1900 Land Title Building,
Philadelphia 10, Pa.
HOWARD H. RAPP
2107 Fidelity-Philadelphia Trust Bldg.,
Philadelphia 9, Pa.

WHITE & WILLIAMS
MORGAN, LEWIS & BOCKIUS
Of Counsel

THE LEGAL INTELLIGENCER, 10 S. 37TH ST., PHILA. 4

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IN THE

Supreme Court of the United States

October Term, 1963

No. 342.

FEDERAL DEPOSIT INSURANCE CORPORATION, TO THE USE OF SECRETARY OF BANKING, RECEIVER OF INTEGRITY TRUST COMANY, TO THE USE OF BUTCHER & SHERRERD, AND FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE,

Respondents,

v.

HARRY J. ALKER, JR. AND MAMIE DUBAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DUBAN, DECEASED,

Petitioners.

Respondents' Brief in Opposition to Petition for Allowance of Writ of Certiorari to the United States Court of Appeals for the Third Circuit and Appendix.

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Did the lower court correctly deny a motion for new trial under Rule 60(b) of the Federal Rules of Civil Procedure filed more than ten years after the entry of judgment and based solely upon alleged newly discovered evidence, especially where the lower and appellate Courts had repeatedly held in the past that such evidence, even if accepted as true, would constitute no ground for disturbing the judgment?

COUNTER-STATEMENT OF THE CASE

The present motion for new trial under Rule 60(b) of the Federal Rules of Civil Procedure was filed on June 16, 1955, more than ten years after the entry of judgment on November 8, 1944. On November 3, 1955, Judge Welsh of the District Court granted a new trial solely on the averments in the motion, without hearing or depositions: 18 F.R.D. 496. On appeal and petition for writ of mandamus, the Court of Appeals for the Third Circuit in its opinion of May 29, 1956, reported in 234 F. 2d 113, directed the vacation of the order granting a new trial and returned the case to the District Court to (1) consider the jurisdictional question of whether the motion was one which Rule 60(b) empowered it to grant and (2) to hear Petitioner-Defendant's witnesses in support of the motion and give Plaintiffs-Respondents an opportunity to rebut them.

For five and one half years thereafter, Petitioner took no steps to prosecute his motion in accordance with the procedure outlined by the Circuit Court. In October of 1961, the Clerk of the District Court issued a routine notification that since no action had been taken for more than two consecutive years, the pending motion for a new trial would be dismissed unless the Court should otherwise order. Petitioner then filed an application for leave to take depositions in support of his motion, which was granted. At the same time, Judge Layton was assigned to hear and dispose of the matter. The only deposition taken by Petitioner was that of John Pellini, taken on January 26, 1962.

The Statement of the Case in Petitioner's Brief contains many inaccuracies, which need not be enumerated, since the salient facts are correctly summarized in District Judge Layton's opinion (Appendix, pp. 8-16) and in the prior opinions of the Circuit Court cited by him (Appendix, p. 8), especially those reported in 206 F. 2d 259 and 234 F. 2d 113.

The grounds upon which a new trial was sought below were all concerned with evidence allegedly unavailable at the

time of trial and had all been repeatedly rejected by the courts on prior occasions as constituting no basis for relief. Judge Layton held that, assuming solely for the purpose of considering the motion that the facts were precisely as Petitioner alleges (and Respondents vigorously deny), nevertheless they would afford no basis for granting a new trial under Rule 60(b).

ARGUMENT

District Judge Layton's opinions (affirmed per curiam by the Circuit Court) so completely, succinctly and convincingly answer each and every one of Petitioner's contentions that it would be pointless again to answer them here by way of argument. Since Petitioner did not print Judge Layton's opinions in his appendix, they are for the convenience of the Court printed as an appendix to this Brief (pp. 8-17).

Since the Trial Court entered its judgment in this action in November of 1944, Petitioner's efforts to obtain relief have surely established a record for protracted litigation. This is the nineteenth time the matter has been presented to this Court. It has been presented to the United States Court of Appeals for the Third Circuit at least sixteen times, to the United States District Court for the Eastern District of Pennsylvania at least twenty times and on other occasions to both the lower and appellate Courts of the State of Pennsylvania.

The various documents (affidavits, depositions, letters, et cetera) upon which Petitioner now bases his claim for relief have been repeatedly considered by this and other Courts and held no basis for disturbing the judgment. With the exception of Mr. Pellini's 1962 deposition, all but two of the documents upon which Petitioner now relies were originally presented to the Courts well over ten years ago and the two exceptions were first presented to the Courts in 1954. In the Appendix to their brief in the Circuit Court

(pages 10b-16b) Respondents have listed some of the many occasions on which these documents have been previously presented to the Courts.

It has been repeatedly and consistently held that the settled law of a case cannot be altered under Rule 60(b). Even had this Court, the Circuit Court, the District Court and the Pennsylvania Courts erred in their legal conclusions in the past (and, of course, they did not) such error could not now be corrected upon motion for new trial.

> "Litigation must end sometime, and the fact that a court may have made a mistake in the law when entering judgment, or that there may have been a judicial change in the court's view of the law after its entry, does not justify setting it aside. Sunal v. Large, 332 U.S. 174, 67 S.Ct. 1588, 91 L.Ed. 1982; Simmons Co. v. Grier Bros. Co., 258 U.S. 82, 42 S.Ct. 196, 66 L. Ed. 475; Elgin Nat. Watch Co. v. Barrett, 5 Cir., 213 F. 2d 776; Berryhill v. United States, 6 Cir., 199 F. 2d 217; United States v. Kunz, 2 Cir., 163 F. 2d 344": *Collins v. City of Wichita, Kansas*, 254 F. 2d 837, 839 (10th Cir.)

To the same effect are: *Berryhill v. United States*, 199 F. 2d 217, 219 (6th Cir.); *Annat v. Beard*, 277 F. 2d 554, 559 (5th Cir.); *United States v. Polites*, 24 F.R.D. 401, 404 (D.C.E.D. Mich.), and cases there cited. Professor Wright's Law Review Article, quoted at length in Petitioner's Brief, clearly supports the view that Rule 60(b) does not justify "a rehearing of the appellate court's decision" but only the consideration of fraud, mistake, excusable neglect, "or newly discovered evidence not previously known to either court" (Petitioner's Brief, p. 23).

We should also add that the Circuit Court's holding in its prior opinion in the case reported in 234 F. 2d 113, 116, n.5 (referred to by Judge Layton) (Appendix, p. 10) that newly discovered evidence (clause 2) may not be considered as a reason for justifying relief under clause 6 of Rule 60(b) has been unanimously supported by the other courts

which have considered the question: *Klapprott v. United States*, 335 U.S. 601, 613; *United States v. Failla*, 164 F. Supp. 307, 314 (D.C. N.J.); *Wallace v. United States*, 142 F. 2d 240, 244 (2nd Cir.); *Certain-Teed Products Corp. v. Topping*, 12 F.R.D. 406, 408 (D.C. S.D., N.Y.). See also 7 *Moore's Federal Practice*, pages 295, 296 and 309.

Since Mr. Pellini's 1962 deposition is the only addition to the record in many years, it should perhaps be given further comment.

The Circuit Court and the District Court have repeatedly held that, even assuming that an agreement existed between the Integrity Trust Company and Petitioner precisely as Petitioner contended it would not afford any defense against a subsequent holder of the obligation in due course (such as the Federal Deposit Insurance Corporation and the present Use-Plaintiffs) because there was no notation thereof on the records of the Integrity Trust Company at the time the obligation was assigned and it was therefore a "secret agreement" within the meaning of *D'Oench, Duhme & Co., Inc. v. Federal Deposit Insurance Corporation*, 315 U.S. 447. In an effort to overcome this ruling, Petitioner on August 12, 1947, alleged for the first time in a petition for rehearing of the decision of the Circuit Court reported in 163 F. 2d 123 that Petitioner had recently discovered in his files the original notes given the Integrity (which had been returned to him at the time renewal notes were given in December of 1936) and that these original notes bore certain notations which might be construed to refer to an oral side agreement.

The Circuit Court, in its opinion reported in 164 F. 2d 469, held that even if this were so it would not affect the applicability of the *D'Oench, Duhme* decision, since the original notes had been returned to Alker and therefore would not constitute notice to an assignee and since the photostats of the notes which were in the Integrity's records showed no such notations. The Court pointed out that the original notes with the alleged legends had admittedly been in Petitioner's possession at the time of trial, although

allegedly misplaced, and added that it felt it "unnecessary to discuss the theory of FDIC, distinctly antipathetic to that suggested by Petitioner, as to how the legends came to be upon the original notes": 164 F. 2d 471.

On August 9, 1949, Mr. Pellini executed an affidavit, which is printed in Petitioner's Brief in the Circuit Court (pp. 56a-58a), in support of the factual averments respecting the notations on the original notes as made in Petitioner's petition for rehearing which had been filed in August of 1947 and disposed of by the Circuit Court in November of that year as above noted. This 1949 affidavit was first presented to the Circuit Court in November of that year as an addendum to Petitioner's Brief in cases nos. 10,002 and 10,015 (disposed of by opinion reported in 183 F. 2d 429). Mr. Pellini's 1962 deposition, while in some material respects inconsistent with his 1949 affidavit, added nothing in Petitioner's favor either to the earlier affidavit or to the allegations in the petition for rehearing of August, 1947, which the Circuit Court had long since rejected as constituting any basis for disturbing the judgment.

While Judge Layton's opinion completely answers any contention advanced by Petitioner upon the basis of Mr. Pellini's deposition, we cannot fail to add that it is indeed remarkable that if the notations in fact existed, Mr. Pellini failed to mention them in his lengthy deposition taken on January 6, 1947, and filed in the District Court on May 5th of that year in support of a motion to reconsider denial of a motion for new trial, although he claimed in his deposition that he had started a diligent search for the original notes promptly upon his return from the army to Mr. Alker's office in September of 1945 and that he had found them in Mr. Alker's home in Norristown about six months thereafter.

In conclusion, we submit that this Petitioner has, over the past eighteen years, received from the District Court, the Circuit Court, from this Court and from the lower and appellate Courts of Pennsylvania every consideration to which he could possibly make claim. Every contention

which he has advanced has been repeatedly weighed and rejected. It has now been well over fifteen years since he has advanced any theory not repeatedly advanced before. We respectfully submit that further protraction of this litigation imposes an undue burden not only upon Respondents, but upon the Courts.

As long ago as July of 1948, Chief Judge Biggs of the United States Circuit Court of Appeals for the Third Circuit said of this very case: "This interminable litigation must be brought to an end. No useful purpose can be served pursuing it further": 169 F. 2d 336. Now, over fifteen years later, we can only echo this sentiment.

CONCLUSION

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

W. WILSON WHITE
RICHARD C. BULL
HOWARD H. RAPP
Attorneys for Respondents

WHITE & WILLIAMS
MORGAN, LEWIS & BOCKIUS
Of Counsel

Dated: August 21, 1963.

Respondents' Appendix

OPINION

(Filed June 20, 1962.)

LAYTON, *District Judge.*

This is an action for a deficiency judgment on a note and for other relief. Before the Court is defendants' motion for a new trial under 28 U.S.C.A. Civil Procedure Rule 60(b). This case has had a long history. The trial Court found for plaintiff in 1944 in an unreported opinion. That judgment was subsequently affirmed on appeal. 151 F. 2d 907 (3rd Cir. 1945). Since then, defendants have repeatedly filed various motions for review, certiorari, new trial, etc., which are summarized in the margin, none of which have produced reversal or modification of the original judgment.[1] The present motion for new trial originally was granted by the District Court. 18 F. R. D. 496 E. D. Pa. (1955), but the Third Circuit Court issued a peremptory writ of mandamus commanding that the District Court order granting the new trial be vacated. At the same time, the Third Circuit Court filed a detailed opinion prescribing the nature of any

[1] The following is a partial list of court opinions dealing with the facts at bar: Judgment for plaintiff affirmed, 151 F.2d 907 (3rd Cir. 1945). Certiorari denied, 327 U.S. 799 (1946); five petitions for rehearing denied, 328 U.S. 877, 879, 881; 329 U.S. 823, 830 (1946). Petition for Bill of Review denied, 163 F.2d 123 (3rd Cir. 1947); Petition for rehearing denied, 164 F.2d 469 (3rd Cir. 1947); Petition for rehearing denied, 169 F.2d 336 (3rd Cir. 1948); certiorari denied, 336 U.S. 953 (1949). Order granting new trial set aside, 183 F.2d 429 (3rd Cir., 1950); two petitions for certiorari denied, 340 U.S. 917, 939; Mandamus issued directing Judge Welsh to vacate Order granting new trial, 206 F.2d 259 (3rd Cir. 1953); four petitions for certiorari denied, 346 U.S. 925; 347 U.S. 924, 940; 348 U.S. 939. Mandamus, which was issued at 206 F.2d 259, vacated, 223 F.2d 262 (3rd Cir. 1955). New trial granted, 18 F.R.D. 496 (E.D. Pa. 1955); Mandamus issued vacating order granting new trial, 234 F.2d 113 (3rd Cir. 1956).

future proceedings on the motion. 234 F. 2d 113 (3rd Cir. 1956). This latest opinion of the Circuit Court is the law of the case, and governs the decision here.

In that opinion, the Circuit Court directed this Court to determine first of all whether it has jurisdiction even to consider a motion for new trial. It is clear from the Circuit Court's opinion that power to grant a new trial here must be found, if at all, within the four corners of 28 U.S.C.A. Civil Rule 60(b). 234 F. 2d at 115. Rule 60(b) provides as follows:

> "(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §1655,

> or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

In the case at bar, the Court may not consider a motion for new trial under clauses (1), (2) and (3) of the Rule (i.e., because of mistake, newly discovered evidence, or fraud) because the express terms of Rule 60(b) provide that a motion for new trial under these clauses may not be made more than one year after the judgment was entered. And the Court is powerless to extend the one year time limits imposed. Federal Civil Rule 6(b) provides:

> "When by these rules . . . an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . order the period enlarged . . . *but it may not extend the time for taking action under rules . . . 60(b) . . .* except to the extent and under the conditions stated [therein]." (Emphasis supplied.)

The present motion for new trial was made on June 16, 1955, more than 10 years after the trial Court's judgment, which was entered on November 8, 1944. It follows, then, that the only grounds for new trial available to the defendants are clauses (4), (5), and (6) of Rule 60(b).

Defendants have offered no evidence to prove that the judgment is void (clause 4), or that the judgment has been discharged, or satisfied (clause 5). The inquiry is thus greatly narrowed. Power to consider defendants' motion for new trial must be found, if at all, under clause (6) of Rule 60(b)—"any other reason justifying relief." And in deciding whether defendants have satisfied the standards of Rule 60(b)(6), the Circuit Court has made it clear that this Court "may not consider as reasons justifying relief under clause (6) mistake, inadvertence, surprise, excusable

neglect, newly discovered evidence or fraud, the reasons justifying relief under clauses (1), (2) and (3) of Rule 60(b)." 234 F. 2d at 116 n. 5.

At a conference, defendants were asked what evidence they would offer at a full hearing of witnesses on the motion, should this Court determine that the allegations in the motion furnish grounds to proceed with such a hearing. Defendants expressly stated they would offer nothing more than the evidence of witnesses whose affidavits and depositions are already of record, and the deposition of one John Pellini, also in the record. The only purpose of a hearing would be to test the credibility of these witnesses. Since this Court is here ruling only on the sufficiency of the allegations, all questions of credibility and fact will be resolved in a light most favorable to the moving party. Use-plaintiffs contend that even if all defendants' allegations are true (which use-plaintiffs vigorously deny), the motion for new trial nevertheless does not meet the minimum requirements of Rule 60(b)(6).

The following facts are alleged by the defendants in support of their motion, and are accepted by the Court (for purposes of this ruling alone) without question.

In October, 1929, Harry J. Alker, Jr., an attorney, had a large broker's loan secured by marketable collateral. The Integrity Trust Co. took the loan over from the broker, and Alker gave two demand notes totaling $592,150 to the Integrity Trust Co. In 1931, the collateral became insufficient and Alker gave new demand notes, in the amounts of $350,000 and $242,150 respectively, secured by additional collateral. Some of the additional collateral was supplied by a friend of Alker, one A. A. DuBan, whose widow and Executrix is a nominal party in this action. The heart of Alker's case lies in his contention that there was an enforceable agreement between himself, DuBan and Integrity providing that Integrity would not "disturb" the loan or the collateral until security values had risen to such a point that Alker could recover his "equity." The Court here assumes that such an agreement existed, although other

reviewing courts, and use-plaintiffs have pointed to persuasive evidence that it did not. See 151 F. 2d 907, 908 (3rd Cir. 1945); 164 F. 2d 469, 470 (3rd Cir. 1947). On the back of the 1931 notes, there appear terse legends, which are the only written evidence of the nature of the agreement, assuming that it existed:

> "For addtl. collateral and agreement with Alker and A. A. DuBan see other note and W. K. H."

On the other note is a legend which states:

> "For addtl. collateral and agreement with Mr. Alker and A. DuBan see W. K. H."

"W. K. H." was an officer of the Integrity Trust Co., the holder of the notes.

In December 1936, the collateral again became insufficient. A new demand note was given by Alker to replace the 1931 notes, additional stock was put up by DuBan, and an insurance policy was procured upon Alker's life, as further collateral. The 1936 note in the amount of $592,150 was given in "substitution and continuance" of the two 1931 notes. But no mention was made in the 1936 note of any agreement between Integrity and Alker. The 1931 Notes, with the legends on the back, were returned to Alker in January 1937, and remained in his exclusive possession thereafter.

In 1941, Integrity assigned the 1936 Note and collateral with its other banking assets to the Federal Deposit Insurance Corporation (FDIC) as security for a loan of approximately $20,000,000. The FDIC continued to receive interest on the Alker loan, certain assigned legal fees, and the benefit of the insurance policy on Alker's life. In 1943,

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[2] However, these typed legends do not appear on photostats of the notes made by Integrity before the notes were returned to Alker in January, 1937. Since the Court is assuming here that legends are authentic, it is unnecessary to discuss the theory of FDIC, distinctly antipathetic to that suggested by Alker, as to how the legends came to be upon the 1931 notes. See 164 F.2d 469, 470-71 (3rd Cir. 1947).

the FDIC, as Liquidator, after notice, sold the collateral, and brought this action to recover the deficiency on the 1936 Note. Alker claims the collateral was sold in violation of the agreement between himself and Integrity; and that the FDIC was bound by that agreement. He has demanded that the sale of the collateral by FDIC be rescinded since appreciation of the security values since the time of the sale in 1943 would have more than paid off the deficiency.

It is apparent from the foregoing that the existence of, and the nature of the alleged agreement between Alker and Integrity is at the heart of defendants' case. The difficulty with defendants' position is that all the arguments and evidence presented in this motion for new trial have been considered and rejected by previous courts. No essential argument presented here is new. The trial Court found that the alleged agreement between Alker and Integrity was lacking in essential "certainty as to proof and certainty as to the time of performance." The Circuit Court, on appeal, implied doubt that the agreement even existed, but, assuming that it did exist, found that it was a secret understanding between Integrity and Alker and was, therefore, not binding on the FDIC under the rationale of D'Oench, Duhme & Co. v. FDIC, 315 U. S. 447 (1942), 151 F. 2d 907 (3rd Cir. 1945). It was only at this point that Alker produced the 1931 Notes with the terse legends on the back. Apparently, these legends are supposed to demonstrate that the agreement was not secret, and therefore that the FDIC is bound by its terms. The Circuit Court has rejected this very argument in a detailed opinion, 164 F. 2d 469 (3rd Cir. 1947), in which it pointed out that these notes were exclusively in Alker's possession after January 1937. At no time, were they available to the FDIC who did not take over the affairs of the Integrity Trust Co. until 1941. The FDIC cannot be bound by writings which it never had an opportunity to see.

The 1931 Notes (with the legends) were not offered by Alker as evidence at the trial. Alker relies heavily on a deposition of a former office employee, John Pellini, to show

that the 1931 Notes were misfiled at the time of the trial, and were not found until after the judgment had been entered. But John Pellini's testimony does little more than explain why Alker did not introduce the 1931 Notes into evidence at the trial, and to buttress the authenticity of the legends on the back of the 1931 Notes. Whatever the significance of the legends, the facts conceded by Alker show conclusively that the FDIC never had any opportunity to see them. It may be that Integrity was negligent in keeping no record of the existence of an agreement not to liquidate collateral. Certainly, it is a fact that no evidence of such an agreement appears in the minutes of the bank or in any correspondence between Integrity and Alker concerning the loan. It is significant that the bank examiner, C. B. Matsinger, failed to mention the existence of an agreement not to liquidate collateral in his written reports of the condition of Alker's loan which he prepared during an examination of Integrity's accounts. But even if we assume arguendo, that Integrity was negligent in keeping its records, such negligence cannot be imputed to the FDIC without a showing that FDIC had notice of the agreement in some way. 164 F. 2d 469, 470. None of the evidence furnished by defendants shows that the FDIC had written notice of the agreement. Even if all of the defendants' evidence is believed, and even if the legends on the 1931 Notes are authentic, the result of the case is not changed. Whatever the agreement may have been, if in fact there was an agreement at all, it was still a secret one so far as the FDIC was concerned, and therefore was unenforceable against them. D'Oench Duhme & Co. v. FDIC, 347 U. S. 115 (1942); FDIC v. Alker, 164 F. 2d 469 (3rd Cir. 1947).

It is well settled that relief from final judgments under Rule 60(b)(6) may be granted in unusual and exceptional cases only. Federal Deposit Ins. Corp. v. Alker, 234 F. 2d 113, 117 (3rd Cir. 1956); John E. Smith's Sons Co. v. Latimer Foundry & Machine Co., 239 F. 2d 815, 817 (3rd Cir. 1956). This rule is needed to buttress the finality of

judgments There must be an end to litigation. Only extraordinary circumstances strongly moving the discretion of the Court can justify relaxation of this policy in a particular case. See generally, 7 Moore, Federal Practice ¶60.27 at 293-312 (1954). The requirements are particularly strong in motions invoking Clause (6) of Rule 60(b) when the motion is made more than a year after the judgment was entered. Clause (6) is a residual clause to be invoked only on the basis of some reason other than those specified in the preceding clauses (1)-(5). 7 Moore, Federal Practice ¶60.27[2] at 300 (1954). Without such a restriction, Clause (6), which may be invoked at any "reasonable" time, could be used to evade the rigid one-year time limitation on bringing petitions under Clauses (1)-(3). For examples of cases where the allegations in the petition satisfied the jurisdictional requirements of Rule 60(b)(6), see Klapprott v. U. S., 335 U. S. 601, 336 U. S. 942 (1949) (denaturalization decree entered by default more than a year previously against petitioner who could not defend himself at that time because of incarceration, poverty, and illness); In re Estate of Cremidas, 14 F. R. D. 15 (D. Alaska 1953) (minor's attorney was so incapacitated by drunkenness at the trial that her claim was in effect not presented). See also U.S. v. Karahalias, 205 F. 2d 331 (2d Cir. 1953). This Court has found nothing in the allegations in the motion at bar to bring it within the rule of the cited cases. None of the contentions made by defendants are even new. All substantial points have been considered and rejected by other courts, as is revealed quickly by reading previous opinions of this Court and of the Third Circuit Court cited herein. Of additional importance here is this fact: even if all of defendants' allegations are believed, defendants still have shown no legal defense to the claim. Thus, a new trial would produce only further delay with no possibility of a change in result.

The defendants also argue that this Court has no power to hear this matter, apparently because the Judge is a United States District Judge for the District of Dela-

ware, not of the Eastern District of Pennsylvania. But this Court was specifically assigned by Chief Judge Biggs to hear and dispose of this matter. There is no merit to defendants' contention.

Motion for new trial denied.

MEMORANDUM OPINION

LAYTON, *District Judge.*

On June 19, 1962, this Court filed an opinion denying defendants' motion for a new trial. On or about June 30, 1962, defendants filed their motion for re-argument, and on or about July 2, 1962, defendants filed a supplemental motion for re-argument.

The first reason assigned as error in defendants' motion for re-argument is the assignment of Judge Layton of the United States District Court for the District of Delaware to reconsider and dispose of defendants' new trial motion when Judge Welsh, who originally heard the entire matter, is still available. Inasmuch as this Court in the first instance did not clearly grasp the defendants' argument relative to this assignment of error, it is felt desirable to dispose of it very briefly.

Defendants' contention is based on decisions of the Third Circuit Court of Appeals in TCF Film Corp. v. Gourley, 240 F. 2d 711, and United States v. Wheeler, 256 F. 2d 745. The rationale underlying the holdings in the two cited opinions is that judges should refrain from involving themselves in a situation where in deciding a matter they may be required to overrule the decision of a judge of the same court in the same case.

However, the facts here clearly differ from those in the cited opinions. In the case at bar, Judge Welsh has retired and spends long periods of time each year away from Philadelphia. Judge Layton was assigned generally by Chief Judge Biggs to hear cases in the Eastern District of

Pennsylvania and specially assigned by Chief Judge Clary on December 8, 1961, to hear this case. At the time Judge Layton was assigned to hear this case, Judge Welsh, even had he been in Philadelphia, was restricted by order of Chief Judge Biggs dated December 4, 1961, to hear the following type of cases: (1) General Naturalizations, (2) Uncontested Motions, and (3) Matters Appearing on Argument List.

Should there be any question whether or not this case fell under category three, "Matters Appearing on Argument List", this was dispelled by a further order of Chief Judge Biggs dated December 28, 1961, (entered before Judge Layton held any hearings in the instant case) amending the order of December 4, 1962, by limiting the matters which Judge Welsh could hear to "Naturalizations" and "Uncontested Motions" only.

It follows that when this Court heard and disposed of this case, Judge Welsh was not available within the meaning of United States v. Wheeler, above cited. This reason for new trial is denied.

As to each and every other of the grounds raised in defendants' motion and supplementary motion for new trial, said motions have been considered and are herewith denied.

Dated: July 11, 1962.

MOTION FILED OCT 27 1963

IN THE

Supreme Court of the United States

October Term, 1963.

No. 342.

FEDERAL DEPOSIT INSURANCE CORPORATION, TO THE USE OF SECRETARY OF BANKING, RECEIVER OF INTEGRITY TRUST COMPANY, TO THE USE OF BUTCHER & SHERRERD, and FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE,

Respondents.

v.

HARRY J. ALKER, JR. and MAMIE DU BAN, Individually and as EXECUTRIX OF THE ESTATE OF ALFRED A. DU BAN, DECEASED,

Petitioner.

PETITION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING AND SECOND PETITION FOR REHEARING.

JAMES J. REGAN, JR.,
1505 Land Title Building,
Philadelphia 10, Pa.,
Attorney for Petitioner.

International, 711 So. 50th St., Phila., Pa. 19143

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1963.

No. 342.

FEDERAL DEPOSIT INSURANCE CORPORATION, TO THE USE OF SECRETARY OF BANKING, RECEIVER OF INTEGRITY TRUST COMPANY, TO THE USE OF BUTCHER & SHERRERD, AND FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE,

Respondents,

v.

HARRY J. ALKER, JR., AND MAMIE DU BAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DU BAN, DECEASED,

Petitioner.

PETITION FOR LEAVE TO FILE A SECOND PETITION FOR REHEARING FOR ALLOWANCE OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the United States Supreme Court:

The petitioner, Harry J. Alker, Jr., hereby asks leave of your Honorable Supreme Court to file a second petition for rehearing of his original Petition for Certiorari to review the judgment of the United States Court of Ap-

peals for the Third Circuit in the above-captioned case, and assigns therefor the following reasons:

Your petitioner filed a Petition for Rehearing with your Honorable Court in the above matter on November 15, 1963, which Motion was refused on December 9, 1963.

Prime Federal questions of nation-wide importance are involved in this case that should be decided by this Court, as follows:

1. In the welter of cases filed herein over the intervening five months after May, 1963, your Honorable Supreme Court may have inadvertently overlooked the broad national importance of your correcting the erroneous judgment of the learned Court below.

2. This national importance is predicated upon the misapplication by the learned Court of Appeals below of the ruling of this Supreme Court in *Federal Deposit Corporation v. D'Oench Duhme & Co.*, 315 U. S. 447, to this case wherein the United States District Court found (Record: p. 502a) as a fact: "*There was no fraud of any kind involved in this matter.*"

3. The nationally *unique character* of this case is likewise shown by the lower Court's misinterpretation of Rule No. 60(b), under paragraph #5 of which the learned United States District Judge, Hon. George A. Welsh, who was also the trial judge herein, granted a new trial to these defendants and whose order granting said new trial was thereafter nullified and superseded by United States District Judge Layton, a jurist of coordinate provincial jurisdiction in Wilmington, Delaware, and hence from a separate or "foreign" district who was unfamiliar with this case and with the reasons given by the Trial Judge, Welsh, for his granting said new trial.

4. The action of said District Judge, Layton, was likewise unique and unjustified nationally in that it was *a radi-*

cal departure from the national comity and uniformity obtaining among all United States district judges of coördinate jurisdiction in that it failed to follow the prior decisions of the learned United States Court of Appeals for the Third Circuit, as rendered in *T. C. F. Film Corp. v. Gourley*, 240 F. 2d 711, and *United States v. Wheeler*, 256 F. 2d 745, both holding that a district judge should abstain from overruling the decision of another district judge of coördinate jurisdiction in the same case.

5. The decision below, which ought to be reviewed here, is also *radically unique* on a nation-wide scale in that the learned United States Court of Appeals below, to the prejudice of petitioner's rights and in deprivation of Due Process of Law, deliberately made it impossible for your petitioner to have the benefit of the Trial Judge's views by erroneously suspending said Trial Judge's right to participate further in this case and by arbitrarily confining said Trial Judge, Hon. George A. Welsh, to the hearing of innocuous "Naturalizations" and "Uncontested Motions".

6. Your Honorable Supreme Court's attention is further respectfully called to the admitted and incontrovertible fact that the respondent herein (plaintiff below) knowingly and deliberately violated the restrictions imposed by its organic Act (Sept. 21, 1950, c. 967, Sec. 2(11), 64 Stat. 873), subdivisions (e) and (f)—12 U. S. C. A. 1821—by making payments to the Integrity Trust Company's (the defunct bank) depositors "regardless of amount", i.e., greatly in excess of the lawful $5,000 insurance limitation.

This *unwarranted and illegal breach* of both law and fidelity, viz.: "*paying a million dollars as well as five thousand dollars*" (Record, pp. 80a-81a) by the respondent (plaintiff below) thereby *irreparably impaired* your petitioner's security and *vitiated the values* of petitioner's collateral in such way and amount as to render it impossible

for him ever to make secure, or to repay, said loan. Such *impoverishment*, moreover, was a deliberate *deprivation of petitioner's property without due process of law*, which the learned Court of Appeals below has now sanctioned by its refusal to affirm the grant of a new trial to petitioner by the Trial Judge, Hon. George A. Welsh, and thus permits a defrauding of all your petitioner's rights.

Petitioner therefore urgently suggests that this was deliberately done to protect the financial interests of the several State banks here involved as use-plaintiffs and otherwise and that such illegal action by Federal Deposit Insurance Corporation nullifies any application of your Honorable Court's *D'Oench Duhme* decision.

Other reasons are referred to in the second petition for rehearing hereto attached and are incorporated herein.

Your petitioner therefore prays leave to file the accompanying petition.

Respectfully submitted,

JAMES J. REGAN, JR.,
1505 Land Title Building,
Philadelphia 10, Pa.,
Attorney for Petitioner.

HARRY J. ALKER, JR.,
Petitioner,
1505 Land Title Building,
Philadelphia 10, Pa.

ORDER.

And Now, , 1963, leave is granted the petitioner to file a second petition for rehearing of the petitioner's petition for the issuance of a writ of certiorari to review the decision of the Circuit Court of Appeals for the Third Circuit in the above entitled case.

By THE COURT,

J.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1963.

No. 342.

FEDERAL DEPOSIT INSURANCE CORPORATION, TO THE USE OF SECRETARY OF BANKING, RECEIVER OF INTEGRITY TRUST COMPANY, TO THE USE OF BUTCHER & SHERRERD, AND FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE,

Respondents,

v.

HARRY J. ALKER, JR. AND MAMIE DuBAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DuBAN, DECEASED,

Petitioner.

SECOND PETITION FOR REHEARING.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Harry J. Alker, Jr., prays that this Court rehear and reconsider its denial of the petitioner's petition for the issuance of a writ of certiorari to review the actions of the Circuit Court of Appeals for the Third Circuit in the above entitled case, and

RESPECTFULLY REPRESENTS

On August 6, 1963, your petitioner filed with your Honorable Court a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit.

On October 21, 1963 your Honorable Court denied the petition for certiorari.

On November 15, 1963, your petitioner filed with your Honorable Court a petition for rehearing, which was denied December 9, 1963.

The history of the case, questions presented, the statutes and law involved, the specifications of errors, and nearly all the reasons for granting the writ are partly set forth in the petitions for certiorari and briefs in support thereof and the subsequent motion and petition for rehearing, to which reference is made as well as the record and will not be repeated here, they being hereby made part of the record, if they have not already been so made. Additional reasons are set forth herein.

Reference is also made to the record, the various petitions and briefs filed in this matter with your Honorable Court as of October Term, 1945, No. 880, which contain further reasons why the writ should be allowed, and they are made part hereof by way of reference.

The questions and reasons given by petitioner in his Petition for Leave to File a Second Petition for Rehearing are also referred to and incorporated herein by said reference.

This is an equitable action. Neither equity nor justice has been done.

Alker had this loan which was taken over by the Integrity Trust Company, an agreement made, Mr. DuBan deposited more stock on certain conditions. In addition to the securities, Alker gave the Federal Deposit Insurance Company insurance, and assigned various fees.

The record shows he kept his part of the agreement meticulously and at great sacrifice. The Federal Deposit Insurance came into the picture and claimed it was the owner of the obligation. The Bank Examiner testified the Examiner's knew about the agreement connected with the loan, and thought it a good one. Alker, after the Federal Deposit Insurance Corporation claimed it owned the note,

kept his part meticulously. This took place for several years. Then, suddenly, when there was no default and the loan had several years to go, the Federal Deposit Insurance called the loan and claims it sold the collateral. The National Dairy refused to transfer the DuBan stock as it was advised there was no default. This proceeding was then instituted by the Federal Deposit Insurance Corporation, who claimed it owned the note and there was a default. Alker and National Dairy defended. Alker was incapacitated. When suit was first sought, all the evidence and witnesses were not available. Long litigation followed. Judge Welsh, the trial Judge, finally granted a new trial.

All sorts of proceedings were tried by plaintiffs. First one objection was interposed after another. As, after great difficulty, each one was met, the Court of Appeals sent it back for trial subject to certain conditions after having first refused a new trial and only granting it when its action in interfering was greatly criticized by various law reviews, who felt it should not have interfered but should let Judge Welsh retry the case and the objections, and then come up on appeal. This caused a lot of delay.

All of this is stated so the Court can see why it has taken so long.

As the Courts constantly have stated, time cannot count when equity and justice are involved.

As to the prolongation of the proceeding.

The plaintiffs apparently abandoned their stand that there was no time fixed for the fulfillment of the obligation which they had always taken heretofore inasmuch as witnesses were produced showing first it was five years and then ten years.

They now stress the time the litigation has extended and there must be an end to all litigation.

The Court's attention is called to the difficulty in locating the witnesses and ascertaining who they were; one

such witness, John Pellini, was absent in the Army in combat duty for three years. Mr. Santamarie had left this territory and was in the far West. He was finally located and, promptly on his return, his testimony was taken. The record shows that Alker was a sick man for a long time, and unable to work.

This is an equitable proceeding in which justice had not been done, and the many steps show that the proceeding was carried on as fast as it could.

As to definite time for payment of note heretofore claimed by F. D. I. C.—not now claimed.

Heretofore the Federal Deposit Insurance Corporation claimed, and the District Court so found, the agreement was void because it claimed no time limit was fixed. Two disinterested witnesses were later produced—one John Pellini, who had been office manager of petitioner for many years, and who was absent from the country in combat duty in the United States Army for a long time, returned to Philadelphia and his evidence was taken; to wit, that the Bank officials had notified him they were extending the loan first for five years and they required a life insurance policy for that term on petitioner, and then, at the end of that period, that it was being extended for ten years and must have insurance for that term; that they had him come to the Bank and get the new note, get it signed, and brought back to the Bank. Then Petitioner produced L. J. Santamarie who had moved to California and lived there a long time. He was located and returned to Philadelphia. He was in the life insurance business. The Bank official in charge told him they were making (first) a five year loan and must have a policy for that term to cover. They ordered him to place it, which he did. At the end of that time the Bank official in charge advised him they were extending the loan for ten more years and must have a new policy for that term; he placed a new policy for the ten years and sent it to the Bank, and the bill to Petitioner. Both witnesses tes-

tified they were advised by an officer of the Bank of the definite extensions of Alker's loan.

This eliminated the contention as to definiteness of time of the loan. Neither Federal Deposit Insurance Corporation nor the use plaintiffs have now raised it.

As to time element in discovering the F. D. I. C. agreement with 12 state banks.

It was not until years long after the suit was brought that the Federal Deposit Insurance Corporation announced in the newspapers it held the obligation for twelve state banks. This changed the picture as the State Banks would have no standing in the Federal Court. It came as a great surprise. It was a clear misrepresentation as it had always claimed it was the owner. The Federal Deposit Insurance Corporation tried to take advantage of this.

The Third Circuit Court of Appeals had recently decided in *Publicker v. Shallcross*, 106 F. 2d 949, that where there has been fraud or misrepresentation, time did not enter a matter, but it opened the matter anew. This would be true as to the present suit. As stated, the Federal Deposit Insurance Corporation had always claimed it had taken an assignment of Alker's obligation and owned the same.

Time therefore was out of the question in this equitable action.

As to DuBan.

The record clearly shows that when Mr. DuBan deposited with the loan the last 1,000 shares of National Dairy Products Corporation common stock, he did so on condition that the loan should be extended and Alker's securities should be held until the Bank gets its debt, DuBan's securities were returned to him and Alker's situation was worked out. He would not leave the stock until the Bank agreed to it. The Bank agreed to it. The record shows this; no one disputed it. The Federal Deposit

Insurance Corporation alleges it sold the collateral. It did so when there was no default. The plaintiffs should not be permitted to keep the proceeds of DuBan's stock if it broke the agreement. His stock, or whatever represents it, should be returned to him. It had no authority from him to sell the stock under the circumstances.

As to one-year rule.

The first Motion for a new trial was filed within the proper time and within the required terms, was timely filed, and that his subsequent motions for a new trial referred to and incorporated in these said provisions of the first motion, and therefore a one-year rule should not restrict the appellant in this instant case.

As to fraud.

The Court below found there was no fraud.

As to affidavits by Bank Examiners as to Knowledge of Agreement by Examiners, Discussion of same with officers of Bank, other examiners.

The State Bank examiner who examined the Bank with a Federal Bank Examiner and Federal Deposit Insurance Examiner, made three affidavits—the first in the office of the late Justice Owen J. Roberts (p. 47a) and then more affidavits, all of which are in the record. He testified that the executive officers of the Bank confirmed to the examiners that the agreement as to the Alker loan existed and the provisions thereof. They advised Examiners that Alker was living up to his agreement scrupulously and that the Bank therefore had to live up to it.

He testified the Examiner for the Federal Reserve Bank was present in 1937, 1938 and 1939, and the Examiner for the Federal Deposit Insurance Corporation was present in 1939. He testified it was good business for the Bank to make such an agreement.

He testified nothing was done that could be construed to deceive, or be designed to deceive, the creditors or the public authority, on which the Federal Deposit Insurance Corporation relied in insuring the Integrity Trust Company, was or was likely to be misled. He testified the executive officers of the Bank confirmed to the Examiners that the agreement did exist, and the terms of the agreement, that nothing was done that could be construed to deceive or be designed to deceive the creditors or the public authority, or would tend to have that effect; that there was no undisclosed or fraudulent arrangement. See Matsinger affidavit, Page 17.

The *D'Oench Duhme* case does not therefore apply.

See letter of Justice Roberts, Page 20.

As to Alker's execution of agreement terms.

The record shows the Federal Deposit Insurance Company admitted there was no default by Alker; the interest paid, the insurance maintained, the assigned fees as received paid. The record shows it also held the insurance as testified to.

Alker claims the alleged sale was illegal as the loan had several years to run and there was no default. Since then petitioner has learned the use plaintiffs a few years ago cashed the insurance and have received, according to the insurance company, $36,900.

As to the F. D. I. C. lending the Integrity Bank an amount greatly in excess of the insured accounts.

Testimony of S. Herman Hall, Liquidating Officer of F. D. I. C.

Page 81(a) Notes of Testimony:

"Q. Where a deposit was for more than $5,000.00 they didn't pay over that amount—they only paid up to that amount?

A. They paid all deposits regardless of amounts:

Q. They did pay all deposits?

A. A million dollars as well as five thousand dollars.

Q. The Federal Deposit Insurance Corporation did?

A. They did."

As to misconstruction by Judge Layton of orders of Court of Appeals.

In authorizing the new trial by the Court of Appeals the Court intended the Trial Judge to consider new evidence. Judge Layton misconstrued that and restricted petitioner to witnesses who had not testified before. There were witnesses who had testified before but who had additional evidence not theretofore given but important to a right decision of the case. This makes it important that a new trial be granted at which the parties may have *all* their witnesses present who will give all the evidence then at one hearing and the Judge will have all the facts. This is vital and Judge Layton's action was a serious error.

Apropos of our averment that Judge Layton erred by misinterpretation of Rule 60(b), attention is directed to his *error of omission* which could have been inadvertent, but is more apt to have been designed. In his opinion (p. 16a of petitioner's C. C. A. brief), Judge Layton correctly quotes Rule 60(b) in toto and verbatim. But when he tries to dispose of petitioner's new trial motion by process of elimination, the learned jurist deliberately omits the *cogently pertinent* part of Rule 60(b)(5), and quickly skips to the inapplicable generalities of 60(b)(6).

More precisely, subdivision (5) of Rule 60 shows that the *one-year limitation on* filing motions for a new trial *does not apply* when "(5) the judgment has been satisfied, released, or discharged, or a prior judgment . . . has been reversed or otherwise vacated, or *it is no longer equitable*

that the judgment should have prospective application." When, however, Judge Layton came to discuss clauses 4, 5, and 6 of Rule 60(b)—(Vide p. 17a of petitioner's C. C. A. brief) he hurried over clause (5); as follows:

> "Defendants have offered no evidence to prove that the judgment is void (clause 4), or that the judgment has been discharged, or satisfied (clause 5). The inquiry is thus greatly narrowed."

Note well, if you please, that he, Judge Layton, is the one who *thus straitened it*, and *not* Rule 60(b)(5). His Honor, Judge Layton, *refrained* from even mentioning the *most germane reason* stated in said clause 5, viz.:

> "*or it is no longer equitable that the judgment should have prospective application . . . .*"

Yet, *this is exactly the reason given by the trial judge*, Hon. George A. Welsh, for his granting a new trial to defendant-petitioner in his opinion, dated November 3, 1955 (pp. 13a, 14a of C. C. A. brief), wherein he said:

> "In our judgment *justice and equity require that defendant*, Alker, *have an opportunity to submit this type of evidence* so that any facts elucidated may be embodied in the findings of fact and conclusions of law in any opinion subsequently filed in the case. The discretion and latitude allowed a trial judge . . . must . . . be exercised . . . *with a conscientious feeling as Chancellor that these additional witnesses should be heard . . . at a new trial . . . .*" (Emphasis ours.)

Thus was it brought squarely within that *pertinently cogent phrase* of clause 5, Rule 60(b) which his Honor, Judge Layton, so conveniently avoided. Hence we strenuously urge that the learned substitute, Judge Layton, gravely erred in his zeal to vindicate the prior errors of the learned Court of Appeals (in issuing mandamus and prohibition which they later vacated) by specifically skipping the ap-

posite phrase of clause 5, and hastening to assure the legal world that clause 6 of Rule 60(b) did not warrant a new trial for the petitioner. Judge Welsh had granted said new trial under clause 5 of Rule 60(b), and it is respectfully insisted that the gross error of his Honor, Judge Layton, was merely compounded further on the affirmance thereof entered by the learned Court of Appeals below. The only method for the correction of these grave errors, which so obviously affect the proper interpretation of Rule 60(b), F. R. C. P., on a nation-wide scale, is by issuance of the Certiorari from this Honorable Supreme Court as prayed for herein.

As to Fidelity-Philadelphia Trust Company, Use Plaintiffs.

Inasmuch as the record clearly shows that Mr. William P. Gest, President of the Fidelity-Philadelphia Trust Company, was chairman of the Executive Committee of the Integrity Trust Company; that the matter of the Alker loan came regularly before the said Executive Committee, that Mr. Gest, who knew Alker, frequently asked whether Mr. Alker was keeping his part, and, when advised that Alker was, the record shows Mr. Gest said if Alker was, the Integrity must. This is an equity case. In view of Mr. Gest's connection with both companies and his familiarity with the whole transaction, the Fidelity Trust Company is estopped from claiming the agreement was illegal and not binding and therefore its claim should be dismissed.

If there ever was a case in which equity and justice required that Alker and the DuBan Estate be granted a new trial, this is it.

The Court should grant a certiorari and pass on this question, or it should refer the matter back to the District Court for a retrial at which all the witnesses and evidence should be presented, and in which Judge Welsh who knew the case from the start could at least sit in.

The matter is one of public importance.

CONCLUSION.

It is contended by the Appellant that he has a meritorious defense to the action against him and that he has clearly established misrepresentation and fraud and a great injustice and wrong has been done. Therefore, the relief requested by him should be granted by this Honorable Court and the judgment set aside, the case reopened, a full trial given him where all the witnesses may be in Court together and testify to all of the facts of which they now have knowledge, irrespective of whether they testified heretofore or not, at which time the validity of the alleged cancellation by the Federal Deposit Insurance Corporation of his loan may be decided as well as in the event it is decided the alleged cancellation of the Alker loan by the Federal Deposit Insurance Corporation is invalid, then to determine the liability of the Federal Deposit Insurance Corporation arising thereout.

Respectfully submitted,

JAMES J. REGAN, JR.,
1505 Land Title Bldg.,
Philadelphia 10, Pa.,
Attorney for Petitioner.

It is hereby certified that the preceding 2nd petition for Rehearing is presented in good faith and not for delay, and is restricted to the grounds above specified.

JAMES J. REGAN, JR.,
Attorney for Petitioner.

HARRY J. ALKER, JR.,
Petitioner.

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.:*

I, C. B. MATSINGER, of 101 West Fifth Avenue, New York City, being duly sworn according to law, deposes and says:

I was a bank examiner for the State of Pennsylvania from November 1, 1929, to November 15, 1943. After that I engaged in the banking business until March 1, 1947, at Easton, Pennsylvania, since which time I have been in business in New York.

While a Pennsylvania state bank examiner, I examined the Integrity Trust Company, a Pennsylvania state banking institution, during the years 1937, 1938 and 1939. My examination was made contemporaneously with and in conjunction with the examination made by the Federal Reserve Bank in 1937 and 1938 and both the Federal Reserve Bank and the Federal Deposit Insurance Corporation in 1939. We examiners worked together in the examination. During the said examination, joint conferences were had by all the examiners with the executive officers of the bank in relation to matters requiring special attention. One of the matters which we discussed with the officers was the loan of Harry J. Alker, Jr., which was the second largest loan in the bank.

The collateral with this loan was rather unusual because it consisted of not only securities belonging to Mr. Alker and those of some friends but also of an insurance policy in the amount of $125,000 on the life of Mr. Alker, payable to the Trust Company together with an assignment of certain large legal fees due to him from the Commonwealth of Pennsylvania. The very presence of this unusual type of collateral was notice to me that there must be some kind of agreement in existence in connection with the loan, even if the officers had never said anything to me about the agreement. The presence of this unusual col-

lateral was a record by the bank that an agreement existed as to the loan.

But the executive officers of the bank would not let the matter rest and they actually confirmed to the examiners that the agreement did exist with Mr. Alker as to the loan and that the bank had entered into the agreement with Mr. Alker, which provided, among other things, that he should maintain the insurance for the term of the policy which the bank placed and pay over to the bank the assigned fees as received, pay the interest on the loan and reductions as he could. They informed us that there was some question as to the right of the bank to collect fees directly from the (fol. 48) Commonwealth earned by Mr. Alker, as the Commonwealth would not recognize assignments, and by making the agreement with Alker and living up to it the bank was sure it would get the fees, which were substantial. They advised us that Mr. Alker was living up to his agreement scrupulously and that the bank therefore had to live up to its agreement. I remember this very distinctly, as this loan was one of the largest in the Integrity and, as I said before, I examined the Integrity several times. The examiner for the Federal Reserve Bank was present in 1937, 1938, and 1939 and the examiner for the Federal Deposit Insurance Corporation was present in 1939.

I have seen copies of the original notes of Alker of 1931 and in my opinion the notations on these notes clearly refer to the Alker, DuBan agreement and the 1936 note clearly shows by the provision inserted at the bottom, a confirmation and extension of that agreement. These notes with the notations on them together with the unusual collateral for surety were all records of the Integrity Trust Company and showed that there was no secret about the matter.

The Federal Deposit Insurance Corporation made no examinations of the Integrity Trust Company until 1939

when they made a joint examination in connection with the state and Federal Reserve examiners.

In my opinion as a banker and a bank examiner of many years' experience, the presence of said term policy and the assignment of fees, together with various other collateral in other peoples' names, accompanied by powers to pledge constituted a record of the bank that such an agreement existed.

In my opinion, it was, furthermore, good business for the bank to make such an agreement. By the agreement the Integrity got a considerable amount of collateral and protection, all of which operated to the benefit of the bank and the public as well as the Federal Deposit Insurance Corporation. In my opinion nothing was done here that could be construed to deceive, or be designed to deceive, the creditors or the public authority, or would tend to have that effect.

There was no undisclosed or fraudulent arrangement. The records of the Integrity Trust Company clearly showed there was no misrepresentation or misstatement as to the Alker loan which was an asset in the portfolio of the Integrity Trust Company. The note was not designed to deceive the creditors or the public authority and would not tend to have that effect. There was no scheme or arrangement (fol. 49) whereby the banking authority, on which the Federal Deposit Insurance Corporation relied in insuring the Integrity Trust Company, was or was likely to be misled.

(Sgd.) C. B. MATSINGER.

Sworn to and subscribed before me this 9th day of August, A. D., 1949.

(Sgd.) J. J. BUCHANAN,
Notary Public.
My commission expires Feb. 1, 1953.

(Seal)

OWEN J. ROBERTS
1510 Morris Building
Philadelphia 2, Pa.
RIttenhouse 6-0650

November 30, 1950

Hon. D. Emmert Brumbaugh
Secretary of Banking
Harrisburg, Pennsylvania

Dear Mr. Brumbaugh:

Sometime ago Harry Alker consulted me about the action in the United States Court by the Federal Deposit Insurance Corporation against him and the DuBan Estate.

At that time the Circuit Court of Appeals had held the agreement made by Alker and DuBan with the Integrity Trust Company was not binding on the Federal Deposit Insurance Corporation, basing its opinion on the case of Federal Deposit Insurance Corporation vs. D'Oench, Duhme & Co., Inc., 315 U. S. 447, which was a fraud case, and citing a criminal section of the Federal Reserve Act. The District Court had held in the Alker-DuBan case there was absolutely no fraud.

I advised Harry that in my opinion the D'Oench, Duhme decision and the Criminal Section of the Federal Reserve Act were never intended to apply to anything but a fraud case and that therefore I was of the opinion he was entitled to a new trial. I thought a great wrong had been done him in the matter because there was no default in interest, Harry having completely performed his part of the agreement in all respects, which agreement the F. D. I. C. had adhered to for almost three years.

I have not changed my mind in this respect and am still of the opinion that a new trial should be granted him.

I understand the Attorney General's office and you have gone into the matter and you likewise feel that this should be done.

I therefore hope you will see your way clear to consent to it.

Yours sincerely,

OWEN J. ROBERTS

OJR:Sy

Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963.

No. 342.

FEDERAL DEPOSIT INSURANCE CORPORATION, TO THE USE OF SECRETARY OF BANKING, RECEIVER OF INTEGRITY TRUST COMPANY, TO THE USE OF BUTCHER & SHERRERD, and FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE,

Respondents,

v.

HARRY J. ALKER, JR., and MAMIE DU BAN, Individually and as EXECUTRIX OF THE ESTATE OF ALFRED A. DU BAN, DECEASED,

Petitioner.

PETITION FOR RE-HEARING OF PETITION FOR ALLOWANCE OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

James J. Regan, Jr.,
1505 Land Title Building,
Philadelphia 10, Pa.,

Robert M. Taylor,
2215 Land Title Building,
Philadelphia 10, Pa.,
Attorneys for Petitioner.

International, 711 So. 50th St., Phila., Pa. 19143

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1963.

No. 342.

FEDERAL DEPOSIT INSURANCE CORPORATION, TO THE USE OF SECRETARY OF BANKING, RECEIVER OF INTEGRITY TRUST COMPANY. TO THE USE OF BUTCHER & SHERRERD, AND FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE,

Respondents,

v.

HARRY J. ALKER, JR. AND MAMIE DUBAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DUBAN, DECEASED,

Petitioner.

PETITION FOR RE-HEARING OF PETITION FOR ALLOWANCE OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Harry J. Alker, Jr., respectfully represents that:

1. On August 6, 1963, he filed in this Honorable Court a petition for allowance of Writ of Certiorari to the United States Court of Appeals for the Third Circuit, seeking review of the Appellate Court's interpretation of Rule

60(b) of the Federal Rules of Civil Procedure; of this Court's opinion in the case of *Federal Deposit Insurance Corporation v. D'Oench, Duhme Co.*, 315 U. S. 447; and several other important findings of that Court.

2. Thereafter, a Brief for Respondents in opposition to Petition for Certiorari was duly filed herein by said respondents, Butcher & Sherrerd and Fidelity-Philadelphia Trust Company, Trustee. Although served by petitioner with copies of his Petition for Allowance of Writ of Certiorari, the Federal Deposit Insurance Corporation did not appear or file a Brief herein.

3. On October 21, 1963, this Honorable Supreme Court denied the petition for Writ of Certiorari.

4. Petitioner believes and therefore avers that, because of the welter of controversies ensuing from the accumulation of an enormously large number of cases filed with this Honorable Court during the 1963 Summer recess, your Court may have inadvertently overlooked the nation-wide importance of the questions of Federal law presented by petitioner's original application for Certiorari herein.

(a) These questions of national importance have always been, and still are, cited in the Rules of this Honorable Supreme Court, and doubtless the most cogent motivation, for the granting of a review by Certiorari from this Court, viz:

Whether or not a Court of Appeals has misinterpreted a Federal statute or Rule of Civil Procedure, whether or not a Court of Appeals has misinterpreted a decision and opinion of this Honorable Court; and whether or not two or more Courts of Appeal have decided a question of law differently.

(b) All such premises suggested by this Court's own rules are present in this case.

5. Hence petitioner respectfully suggests that it is well-nigh imperative that all United States Judges, the many hundreds of thousands of bank depositors and borrowers, who might otherwise be victimized by the utter lack of such a beacon, are entitled to ultimate guidance inevitably ensuing from a definitive, reasoned opinion of this Honorable Court to be reported on these grave Federal questions, properly raised, but improperly decided in the Court below.

6. The instant matter is of great importance, because, today, every one seems to be borrowing from banks, agreements are made, and where an honest agreement is made, both sides should be compelled to live up to such agreement. It is more important because the Appellate Court in this case relies on the *D'Oench, Duhme Co.* case (315 U. S. 447), which was a fraud case, whereas herein there was no fraud, and the *D'Oench, Duhme* case should not apply.

That the general public and banking institutions are greatly interested in this matter is indicated by an article that appeared in "The Pennsylvania Banker" (dated September 2, 1950), "meanwhile, it was learned that the Kansas Supreme Court takes the opposite viewpoint from that rendered by the Third Circuit in the case of *F. D. I. C. v. DuBan.* In the latter decision, it was held substantially that F. D. I. C. is not bound by any contract whether fraudulent or not, made by an insured bank as to an asset acquired by F. D. I. C. However, the Kansas Supreme Court, in *F. D. I. C. v. Cloonan*, 165 Kans. 68; 193 Pacific Rep. 2d ser. 656, held that the only parties to contract by F. D. I. C. with an insured bank under which banks assume insured deposit liabilities of a failed bank, are the corporation and the bank, and a creditor or debtor of failed bank is not a party, and his rights and liabilities are not affected by terms of contract.

The decision also holds that where F. D. I. C. contracted with state banks to assume deposit liabilities of

failed banks, and corporation took over assets of failed bank which were not acceptable to state bank, F. D. I. C. became a holder of such assets with same rights as failed bank would have had, but was not a holder in due course of notes comprising a portion of assets. . . . ."

Proof has never been produced that the Alker agreement with Integrity was a secret agreement.

It should be noted that the F. D. I. C., in the instant case, never pleaded a secret agreement, and therefore should not now be permitted to use it as a defense.

Mr. Matsinger, the Pennsylvania State Bank Examiner, testified in a deposition taken in the office of petitioner's counsel, Honorable Owen J. Roberts and McCracken, in Philadelphia, and who was also cross-examined by F. D. I. C.'s counsel, that the Federal Reserve and State bank examiners worked together on the examinations of the Integrity Trust Company; that the officers of the Integrity disclosed to the examiners the nature of the Alker agreement, and they all thought it was a good thing for the bank.

A question arose during the original trial of this matter as to whether or not the Alker agreement appeared in the Minutes of the Bank's executive committee. It was brought out that the pages thereof were taken apart by other persons searching said records for different matters in which they were interested and some of the pages were not returned, lost, mislaid or destroyed. However, evidence was produced that Mr. William P. Gest, President of the Fidelity-Philadelphia Trust Company, who knew Mr. Alker, was also chairman of the Executive Committee of the Integrity Trust Company, and that he regularly asked, when Mr. Alker's loan came before the executive committee, whether Alker was living up to his agreement, and when advised by the officers that he was, he stated that if Alker lived up to it, the bank must.

7. Here, in the instant case, the petitioner, Alker, was indebted to the Integrity Trust Company, a Pennsylvania State institution whose deposits were insured by the Federal Deposit Insurance Corporation.

The Integrity Trust Company made a loan in 1929 to Harry J. Alker, Jr., on certain collateral. The collateral depreciated and the Trust Company in 1931 requested additional collateral. Alker was not in shape to advance this, and DuBan, a friend, offered to deposit 1,000 shares of the common stock of the National Dairy Products Corporation provided Alker deposited and maintained a large life insurance policy in favor of the trust company, assigned certain fees and maintained the interest and so long as he did so the trust company would not liquidate the loan or force the situation. The trust company then felt it would take five years within which to work the situation out and fixed the time limit for forbearance at five years and placed a term insurance policy for that time. This was satisfactory to Alker and DuBan and the stock was deposited by DuBan. The fees were assigned by Alker and the insurance was placed by the trust company at Alker's expense. The depression still existed in 1936 when the first insurance policy expired and it was agreed therefore that the time must be extended; the trust company determined it would take ten years more to work the situation out; the time for forbearance was extended for ten years and a new term policy for that period placed. The trust company arranged this insurance through a Mr. Santamarie, an insurance expert, stating to him that the loan was being extended for ten years. The original agreement and extension were oral and were approved by the executive committee of the trust company of which Mr. William P. Gest was a member. Alker carried out his part of the agreement and so did DuBan. The trust company of course reserved the right without restriction in the event of default to call the loan and convert the collateral. During all these years, Alker maintained the insurance, paid the interest, turned over the

assigned fees as received, and made certain reductions on the principal. In 1940, while this arrangement was in effect, the Integrity Trust Company was about to fail. The Federal Deposit Insurance Company a day or so before the actual closing advanced certain moneys to the Integrity, taking the assets of the corporation as collateral for itself and twelve state institutions who also had advanced cash to the Integrity. *Under the terms of its agreement with the state institutions the Federal Deposit Insurance Corporation acted as "liquidating agent" for the group.* It interviewed Alker and others conversant with the Alker loan and agreement, and after such interviews and with knowledge of said agreement, relating to said loan continued to accept Alker's interest, certain of the fees, and the benefit of the insurance for over two years, never during that time either questioning or intimating an intention of repudiating the agreement. In 1943, the Federal Deposit Insurance Corporation, while still acting as liquidating agent, suddenly arbitrarily repudiated the agreement, and sold to itself all the collateral with the loan, except one large assigned fee. Since the sale the securities have appreciated tremendously, and, had the securities been held as collateral in accordance with the agreement, the loan would have been paid in full and the excess collateral restored to the respective parties.

An *equity* proceeding was instituted in the District Court by the F. D. I. C. after the sale to establish a deficiency against Alker, and to compel the National Dairy Products Corporation to transfer the DuBan stock standing in DuBan's name to the Federal Deposit Insurance Corporation. At the trial, the Federal Deposit Insurance Corporation took the position it was not bound by the agreement with the trust company on the theory it was an alleged lender without notice; this in spite of the fact that it had accepted the interest and checked the insurance status regularly since 1940, after knowledge of the alleged agreement. Had Alker died during this period it would

have received $125,000 under the insurance policies. The Federal Deposit Insurance Corporation admitted at the trial there had been no default in the payment of interest or the maintenance of the insurance or the payment of the assigned fees as received.

At no time during the trial did the Federal Deposit Insurance Corporation reveal to the chancellor the fact that it was acting as liquidating agent for itself and the twelve state institutions. This fact was not known to your petitioners until years afterward when a public announcement was made in the newspapers by the Federal Deposit Insurance Corporation that the state institutions had been paid back by the Federal Deposit Insurance Corporation as liquidating agent all the money that was due them by the Integrity Trust Company. At the trial the Court refused to hear the testimony of the insurance agent who arranged the insurance for the Integrity and who discussed the matter with the trust company's executive officer, which said insurance agent was prepared to testify that in 1936 the said executive officer advised him the trust company was making a ten-year loan and must have insurance protection to cover that period. The District Court, without this testimony (which would have clarified the situation), decided the agreement was too indefinite as to time of performance. The Chancellor, however, found as a fact there was no fraud.

When the matter was appealed to your Honorable Court, this question was not passed on, but the Court, simply assuming that there was a valid contract, decided that the case was controlled by the *D'Oench, Duhme* case, 315 U. S. 447; and that as a matter of law, the agreement was a "secret agreement" and contrary to the policy to protect the Federal Deposit Insurance Corporation as established by that case.

That in the trial of the said case, a representative of the plaintiff testified that the Federal Deposit Insurance

Corporation had made an advance to the trust company immediately before it closed, taking as collateral the assets of the bank including the said note and collateral and in so doing it had relied entirely upon the bank examiners for its information as to the collateral and any agreements relating thereto.

8. At the trial, the Federal Deposit Insurance Corporation produced two examiners, who testified that they *found among the records no evidence of any agreement* relating to the alleged note of Alker, one of the petitioners. They do not say they were not informed there was an agreement.

9. That *at the trial of the case* the defendant offered to prove by L. J. Santamarie, an insurance expert, that the executive officer of the trust company had advised him in discussing the insurance, which it was arranging through him, that the loan had been extended for ten years from 1936 and that the insurance company must have an insurance policy on Alker's life for $100,000, to cover a ten-year period, and had him place such a policy. That the offer of this evidence was refused by the trial court. His deposition was subsequently taken and filed in Court.

That one of the objections the Trial Court made to the agreement, which it admitted had been made, was lack of certainty as to time of performance. Mr. Santamarie's testimony would have answered this objection, and subsequently did, as it definitely fixed the period for forbearance.

He was corroborated in this by the testimony of John Pellini who also testified as to the execution of the new Alker note and the inscription put on his old notes by the bank officials. Pellini also testified as to his incorrect filing of the mislaid returned note which kept it from being produced at the trial.

The interest of the general public as well as lawyers and law journals, nation-wide, in the final decision of the questions involved in this case as to Rule 60(b) is amply

indicated by the excerpts from the various law School Law Journals and Barrons and Holtzhoffer's treatise, all of whom had articles on the subject and copies of which are in the record.

The trial judge in this instant case was the Honorable George Welsh, a judge and chancellor of great judicial experience and who heard the case from beginning to end and who twice found, under Rule 60(b) that petitioner was entitled to a new trial. It is contended that he should have been permitted to hear argument on the last motion for a new trial instead of being directed not to hear any more contested motions and arguments, shortly before this case came up for hearing. He was the sole one to find whether or not fraud and misrepresentation had been practiced upon his Court by the plaintiff.

There are many reasons for the allowance of a new trial such as the following:

It is believed the lower Court Judge misconstrued the Court of Appeals' order and restricted the petitioner to new witnesses and would not permit a witness, who had already appeared, to give testimony as to matters he had not been asked about before.

It was vital that such testimony should be taken.

The necessity for this proves that justice requires a new trial should be granted at which all the witnesses would appear and testify at the same hearing. To fail to grant the same constitutes a denial of his rights and prevents equity and justice being done.

Respondents refer to the fact that whoever examined the Minutes of the executive committee failed to find an approval for it of the agreement between Alker and the Trust Company.

One of the employees of the company testified that various people had come to the Trust Company about matters before the Executive Committee, and pulled the same apart, with the result that many parts were missing and

out of place, and one could not tell whether the Committee records had shown approval of the loan from time to time or action thereon.

John Pellini testified when the last extension was made the old notes were returned some time later, and that they bore endorsements, that he filed them away, and then for a long time could not find them. Long after, in doing some filing in old flaps, he discovered them in a flap marked "Adoptions", which was next to an "Alker" flap, which "adoption" flap had not been used for a long time.

The same bore endorsements:

"for addtl. collateral and agreement with Mr. Alker and A. A. DuBan
see W. K. H."

"For addtl. collateral and agreement with Alker and A. A. DuBan
see other note and W. K. H."

[The initials "W. K. H." in both endorsements refer to Walter K. Hardt who had been President of the Integrity Trust Company.]

Testimony was given by the use plaintiff that no such endorsement appeared on the photographic copy of the note in the possession of the bank.

An employee of the Trust Company testified this could well have happened, as the duplicating machine was new, and not working properly a large part of the time, and the employes of the Trust Company had not yet become very proficient in operating same and, if note was not put in right, endorsement would not appear.

When Judge Welsh was all set to hear argument of the motion for new trial the last time, and counsel were present, one of counsel for the use plaintiff appeared and stated to the Court that, in the matter, Attorney Almsted had always appeared for the F. D. I. C.; and asked the

Court to continue the argument to permit the F. D. I. C. to arrange for Mr. Olmsted to appear for it. Had it not been for that, the motion for new trial would have been argued then and there, and the matter in due course disposed of by Judge Welsh.

Although notice was always given to the representative of the Federal Deposit Insurance Company, the representative of the Federal Deposit Insurance Company has *not* appeared.

As in the event Alker is successful and the sale of the securities is set aside, it will be an important matter for the Federal Deposit Insurance Company, and it is important that a new trial be granted at which *all* the evidence may be presented at one hearing and the Federal Deposit Insurance Corporation participate.

Long ago the F. D. I. C. tried to substitute the Secretary of Banking, Receiver, for itself. The Court refused to let them do so and thus avoid their responsibility. They were only allowed to mark the matter to the use of, thus being retained in the picture.

The Federal Deposit Insurance Corporation *originally* claimed it was the owner of the notes and instituted this equity proceeding as such. It was not *for a long, long time* that it announced it was acting as the agent for a number of state banks.

As this changed the situation completely, it constituted misrepresentations and the Federal Insurance Corporation could not take any advantage of *time*. In *Publicker v. Shallcross, et al.*, 106 Fed. 2d 949, the Court of Appeals for the Third Circuit held, where there has been misrepresentation in a matter, the party guilty of the misrepresentation can not raise any question as to time and delay. This answers the contentions of the F. D. I. C. and the use plaintiff. The matter has run over a long period of time. However, all the evidence was not available, witnesses had to be located, Alker was ill for a considerable time. Because of

all this it has taken a long time, but the F. D. I. C. and the use plaintiff cannot complain.

An effort was made to have the law as to the rights of the F. D. I. C. in connection with contracts between banks insured by it and customers clarified. The Act was amended but not made retroactive. As the agreement here involved was prior to the date of the Act, it does not apply here—as set forth in the Congressional record for July 20, 1950, page 10886.

After the F. D. I. C. alleged it had terminated the agreement, it accepted interest on the indebtedness from Alker for two months. Then, later on, discovering it had so acted, it attempted to apply the payments to principal even though Alker refused to agree thereto, claiming there had been no default, the loan had several years to run, and the alleged termination and sale of assets were illegal. For years afterwards he tendered interest regularly and maintained the insurance.

After the alleged termination of the loan and alleged sale of the securities, Alker saw Leo Crowley, the head of the F. D. I. C. in Washington, in reference to the matter. Mr. Crowley called Chicago and talked, and then advised Alker his collateral was intact, advised Alker if Alker would raise $50,000 cash and get a fee of $50,000 due him and apply them on account, he would reopen the matter and extend the same for a number of years at 3%. Alker raised the $50,000 cash, but the attorney here for F. D. I. C. interfered with the fee referred to, and Alker was unable to get it released right away. A long time afterwards in the course of the litigation, an effort was made to reopen the matter, and one of Alker's clients deposited with the District Court $50,000 in securities as an evidence of good faith. The attorney for the F. D. I. C. spoiled this.

The above proves the honesty of Alker and his desire to secure justice and equity.

Heretofore the F. D. I. C. and the use plaintiff raised the question as to definiteness of time.

The evidence clearly showed there was a definite time —first five years and then ten years.

John Pellini and Mr. Santamarie, both testified they were so advised by the bank officials. This evidence is neither impeached nor controverted by the plaintiff; hence it is conclusive in favor of your petitioner.

Judge Welsh was in the case from the beginning. During one of the hearings he said he would not finally decide the case until he had all the evidence. He was available for the final proceedings and should at least have sat in on it in order that justice might be done. By failing to have him sit in on the matter and give the benefit of his experience in it the petitioner Alker was deprived of his legal rights and the matter should be sent back for retrial with him at least sitting with one of the Judges. He is and was always available.

Wherefore, the petitioner, reiterating that he has fully complied with the extension agreements, cogently proved as shown by the record, which were thereafter confirmed, and then wantonly disregarded and violated by this Federal corporation, the F. D. I. C., earnestly and respectfully insists that, not only do equity and justice but also the record facts and the nationally important law applicable thereto inevitably show that the new trial granted in this case by the learned hearing jurist, Judge Welsh, conformably to Rule 60(b), ought most certainly be confirmed. And this very proper disposition of the case may now be achieved only by the swift and certain issuance of this Honorable Supreme Court's writ of certiorari for which your petitioner herein courteously prays.

Respectfully submitted,

JAMES J. REGAN, JR.,
ROBERT M. TAYLOR,
Attorneys for Petitioner.

HARRY J. ALKER, JR.,
Petitioner.

Petitioner certifies that the preceding Petition for Re-hearing is presented in good faith and not for delay, and is restricted to the grounds above specified.

JAMES J. REGAN, JR.,
ROBERT M. TAYLOR,
Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1963.

No. 342.

FEDERAL DEPOSIT INSURANCE CORPORATION, TO THE USE OF SECRETARY OF BANKING, RECEIVER OF INTEGRITY TRUST COMPANY, TO THE USE OF BUTCHER & SHERRERD, and FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE,

Respondents,

v.

HARRY J. ALKER, JR. and MAMIE DU BAN, Individually and as EXECUTRIX OF THE ESTATE OF ALFRED A. DU BAN, DECEASED,

Petitioner.

PETITION FOR LEAVE TO FILE THIRD PETITION FOR REHEARING AND THIRD PETITION FOR REHEARING.

HARRY J. ALKER, JR.,
1505 Land Title Bldg.,
Philadelphia 10, Pa.,
Petitioner.

International, 711 So. 50th St., Phila., Pa. 19143

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1963.

No. 342.

FEDERAL DEPOSIT INSURANCE CORPORATION, TO THE USE OF SECRETARY OF BANKING, RECEIVER OF INTEGRITY TRUST COMPANY, TO THE USE OF BUTCHER & SHERRERD, AND FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE,

Respondents,

v.

HARRY J. ALKER, JR., and MAMIE DuBAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DuBAN, DECEASED.

Petitioner.

PETITION FOR LEAVE TO FILE A THIRD PETITION FOR REHEARING FOR ALLOWANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Harry J. Alker, Jr., hereby asks leave of your Honorable Supreme Court to file a Third Petition for Rehearing of his original Petition for a Writ of Certionari to review the Judgment of the United States Court of Appeals for the Third Circuit in the above captioned case, and assigns therefor the following reasons:

Your petitioner filed a Petition for Rehearing in the above matter with your Honorable Court on November 15, 1963, which petition was refused on December 9, 1963, and your petitioner filed a Petition for Leave to File a Second Petition for Rehearing in the above matter with your Honorable Court on December 27, 1963, which petition was refused on March 2, 1964.

Besides *Prime Federal* questions of nation-wide importance involved herein and previously referred to, is the question and necessity of upholding that sacred concept, "Equal Justice Under Law" to all citizens including the petitioner.

This instant and immediate petition for leave to file a Third Petition for Rehearing is an appeal to this Honorable Supreme Court so that it may, in all fairness, justness and equity, right a great wrong done to the petitioner by a Federal Agency, to wit, the Federal Deposit Insurance Corporation.

Your petitioner feels, believes and claims that he is in the same or similar position as was William L. Greene, plaintiff, in the case of *Greene v. United States*, 11 L. Ed. 2d 576, where this Honorable Court held that Mr. Greene was entitled to be made whole for his losses by the Federal Government that caused them.

The "New York Times" newspaper on February 21, 1964, editorialized on this Court's action in the Greene matter as follows:

"ELEVEN YEARS TO JUSTICE -

"Eleven years ago William L. Greene of Annapolis, Md., was labeled a security risk by the Navy and forced out of his job as vice president of a company with defense contracts. Without a security clearance he could get no work in his professional field, aeronautical engineering, nor could he find out who thought he was a man of suspicious views. The Government would not disclose the names of its 'confidential informants.' Mr. Greene sued.

"In 1959 the Supreme Court held that the Navy had no authority to deprive a man of his livelihood by such unfair methods. By then, six years after his removal, Mr. Greene had lost touch with aeronautical engineering and was in the building business. He therefore did not ask for a new security clearance, but he did seek compensation for his lost salary. The Government said it would pay him nothing unless he could prove, in a new hearing, that he should have been cleared originally... Mr. Greene sued again.

"This week the Supreme Court decided a second time in Mr. Greene's favor, holding that he was entitled to be made whole for his losses by the Government that had caused them. The decision is a footnote to the history of an unhappy period when men's reputations and livelihoods were destroyed on unsupported suspicion.

"But the case speaks to the present as well as the past. Why should the Government have to be sued to right so obvious a wrong? It is fortunate that we have a Supreme Court to correct such governmental indifference or niggardliness, but not every victim will have the tenacity of William L. Greene to fight on for eleven years."

Petitioner contends and claims that if there was ever a case in which justice required a reconsideration and opening of the matter, it is his present and instant one.

Again, on March 6, 1964, the "New York Times" editorialized on the sacred concept, "Equal Justice Under Law" (*United States v. Roy M. Cohn*).

The newspaper in its editorial states, "* * * What must be upheld in this or any other case is the sacred concept carved above the Supreme Court's pillars: 'Equal Justice Under Law.' That applies to a James Hoffa, who stands for the worst in trade union leadership, or to a Roy Cohn, who helped write the book on how to abuse wit-

nesses when he served as the late Senator McCarthy's closest assistant and confidant. That fundamental idea was expressed long ago by Justice Brandeis: 'At the foundation of our civil liberty lies the principles which deny to Government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen * * *.' ''.

Here in the instant case the petitioner alleges that the acts and actions of the Federal Deposit Insurance Corporation and its officers and employees were improper, unlawful, arbitrary and capricious. In addition thereto, petitioner alleges he has not been given equal protection of the law and due process as provided by the Fifth Amendment to the Constitution of the United States, nor received just compensation for his property taken by a Federal agency.

Petitioner contends it was never the intention of Congress to give to the Federal Deposit Insurance Corporation a stronger position than the State Bank had where it takes over from the State Bank an obligation. *Congress always intended any legal agreement with the State Bank as to the obligation should, in the absence of fraud, be binding on the Federal Corporation.*

The effect of the present decision if it is allowed to stand is to hold the Federal Deposit Insurance Corporation was not bound by the State Bank's agreement.

This is an important federal question and one that would affect any one who did business with the Federal agency.

It is vital to the public interest as well as the petitioner that the matter be reopened, a full trial held and the matter be properly decided.

A perusal and study of the history of the Federal Deposit Insurance Corporation's actions in this matter can only lead one to a sole conclusion that the petitioner has been greatly and improperly injured and damaged by the results found in this case, and a great injustice has been done.

The facts disclose that in 1931 petitioner, Harry J. Alker, Jr., had a loan of $592,150.00 with the Integrity Trust Company of Philadelphia, Pennsylvania, for which he had put up security collateral with the bank as well as his note payable. Among such collateral were 3400 shares of stock of the National Dairy Products Corporation owned by his friend, Alfred A. DuBan, and loaned to him for that purpose. As petitioner's collateral became worth less than the required amount, in 1931, the Integrity informed petitioner that it required additional collateral be put up by him to better secure his loan. Petitioner approached his friend, DuBan for a loan of more National Dairy stock and Mr. DuBan and Mr. Alker, after various conferences with the bank's President and other officers, came to an agreement with the Integrity that he, Mr. DuBan, would put up an additional 1000 shares of National Dairy stock with the Integrity, provided Mr. Alker's account would not be disturbed; that Mr. Alker would put up additional life insurance of $100,000.00; assign certain large legal fees due him from the Commonwealth of Pennsylvania, and would pay the interest on the loan regularly as well as paying the insurance policy premiums regularly; and the Integrity in turn would not disturb the Alker account. That was the agreement and the Integrity and Mr. Alker and Mr. DuBan carried out faithfully the terms provided thereby.

Subsequently the Trust Company put a time limit of five years on the agreement and then a ten-year limit. *It had over three years to run when the loan was called. There was no default.*

The fees mentioned above owed to petitioner by the Commonwealth of Pennsylvania were not assignable; nevertheless petitioner arranged for them to be paid to the Integrity and they totalled a very substantial amount.

Later, near 1940, the Integrity began suffering hard times and became in an unsatisfactory position and twelve Philadelphia banks, six of them being Pennsylvania state banks and the other six being National banks, deposited,

subject to certain unknown restrictions as to repayment, some $9,000,000.00 in the Integrity, in an endeavor to help it survive.

However, the Integrity was not able to do so, and applied for a loan from the Federal Deposit Insurance Corporation. On or about January 13, 1940 the Federal Deposit Insurance Corporation made a loan of $21,000,000.00 to the Integrity, and the Integrity, in turn, pledged and assigned all its assets including petitioner's note and collateral to the Federal Deposit Insurance Corporation.

Prior to the consummation of said Federal Deposit Insurance Corporation loan, the said twelve banks executed an unknown secret agreement with the Federal Deposit Insurance Corporation (dated **January 2, 1940**), which was not known to petitioner until March 5, **1947**, when the Federal Deposit Insurance Corporation published the results of its liquidation of the Integrity Trust Company. In so many words, the F. D. I. C. was acting as a collection agency for the benefit of and to protect the said Philadelphia banks.

This secret agreement provided that the said twelve banks would turn over to the Federal Deposit Insurance Corporation $3,000,000.00 of its deposits, free and clear of any offset, counterclaim or reduction of any kind or character, and the Federal Deposit Insurance Corporation, in turn, after it had collected and indemnified itself up to a certain amount of its loan, would then first pay to the twelve associated banks its loans and deposits before payment to other depositors and creditors. A copy of said agreement is contained in appellant's Brief and Appendix (pages 25a to 35a).

Immediately after the Integrity was taken over by the Federal Deposit Insurance Corporation, petitioner called upon its liquidator in Philadelphia and apprised him of the agreement with DuBan, himself and the Integrity, and its terms. The Federal Deposit Insurance Corporation liquidator went along with petitioner on the terms of the said agreement and petitioner faithfully carried out all of

his commitments, paying thousands of dollars in interest and premiums respectively on said loan and insurance policy, and turning over the assigned fees as received.

Then in January 1943 the Federal Deposit Insurance Corporation without any cause, arbitrarily, unlawfully and capriciously called petitioner's loan and sold his securities at a purported "public sale" which, petitioner contends, was illegal. The Alker securities were bought in by the Federal Deposit Insurance Corporation for $358,336.50, forcing petitioner to incur a great loss thereon. It is to be noted that petitioner, not recognizing the purported sales as being a lawful one, tendered his interest regularly for years thereafter.

The F. D. I. C. accepted the interest for two months after said sale. At the end of said two months the F. D. I. C. discovered what it had done and attempted to apply the two payments on principal.

Petitioner, however, did not recognize the alleged sale or the alleged calling of the loan and continued regularly to tender the interest for years and maintain the insurance.

The Federal Deposit Insurance Corporation then instituted an equity suit in the United States District Court for the Eastern District of Pennsylvania to establish a deficiency against Alker. As a result of said suit, the Federal Deposit Insurance Corporation received a judgment of $108,236.89 against Alker.

The Federal Deposit Insurance Corporation in its complaint and amended complaint against petitioner in said suit brazenly and unlawfully took the position that it was a holder in due course of petitioner's note and an alleged lender without notice, this in spite of the fact that it had accepted petitioner's thousands of dollars of interest and checked regularly Alker's payments of his life insurance premiums and assigned fees. The petitioner claims that the Federal Deposit Insurance Corporation had only the same rights in Court as any other litigant and should have been so treated instead of having been favored therein.

Arbitrary, capricious and unreasonable action is not due process of law. *Rudder v. United States*, 226 F. 2d 51.

A deprivation of liberty to which the Government is a party, is unconstitutional when it is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. *Polla k v. Public Utilities Commission of District of Columbia*, 191 F. 2d 450.

Arbitrary discrimination between persons in similar circumstances is a denial of due process. *Wallace v. Currin*, 95 F. 2d 856, affd. 306 U. S. 1.

The petitioner claimed and proved Federal Deposit Insurance Corporation was not a holder in due course of his note but was only an assignee and pledgee subject to all of his set-offs and counter-claims against the Integrity.

Unfortunately, however, this question was not decided by the lower Courts, and petitioner contends and requests herein that he should be given such a new hearing to have all of his rights decided by the trial Court. He states again that he has proved by competent evidence that he had a valid, lawful agreement with the Integrity Trust Company and that the Integrity Trust Company and its assignee Federal Deposit Insurance Corporation or either of them could not call his loan as long as he carried out the terms of their agreement (which he did faithfully). *That this transaction was found by the District Court trial judge to be free of fraud.*

Chief Bank Examiner Matsinger deposed that, in his opinion, it was good business for the Integrity to make such an agreement. By it the Integrity got a considerable amount of collateral and protection, all of which operated to the benefit of the bank and public as well as the Federal Deposit Insurance Corporation. That there was nothing done that could be construed to deceive the creditors or public authority or would tend to have that effect (49a of Off. Brief C. C. of A.).

As to any delay alleged in this matter to bring the case to a summation, much time was necessary in obtaining the

testimony of witnesses Pellini and Santa Marie. Pellini was serving in the United States Army overseas at the time of trial and, although Santa Marie was present to testify at the trial as to the terms of the said Alker-DuBan-Integrity agreement, the trial judge refused to hear his testimony in error, and then Mr. Santa Marie moved to California and his whereabouts were unknown for a long time. Also, your petitioner is aproximately 79 years of age, and was ill and hospitalized a great deal of the intervening time, being in three different hospitals and having undergone two serious operations.

Petitioner further contends and alleges that there was a misinterpretation by the hearing Judge of the District Court Judge's order as to what witnesses could testify at the meeting before him for taking depositions of further testimony in the case. He restricted it to new witnesses and not new evidence, eliminating witnesses who had previously testified but would have given new testimony of material facts, which was vital to petitioner's case. These witnesses should be permitted to give this evidence and to present the same. Refusal to permit the same was certainly a denial of due process.

Petitioner requests this Honorable Court to note that the President of one of the plaintiffs herein, Fidelity-Philadelphia Trust Company, had full knowledge of petitioner's agreement with the Integrity Trust Company at all times and the fact that the state banks should be subject to state law. Mr. Gest, the President of the Fidelity was chairman of the Integrity Finance Committee and frequently asked for a report as to Alker's loan.

Petitioner further claims that he should have received a just compensation and value for the illegal taking of his property by the Federal Deposit Insurance Corporation. That what it did was improper, unlawful, arbitrary and capricious, and that it should have made him whole for the unlawful sale of his collateral let alone to give the Federal Deposit Insurance Corporation an additional judgment of

some $108,000.00. That he is entitled to same under his constitutional rights and privileges, as this property was unlawfully appropriated by a Federal Agency; that he should be put in as good a position, at least, pecuniarily as he would have occupied, if his property had not been sold, out of all fairness and equity. That the Federal Deposit Insurance Corporation came into Court with unclean hands when it claimed and pleaded it was a holder in due course of petitioner's note when in fact it knew that it was only an assignee with much less rights. That it should not have been permitted to obtain this "unjust enrichment" by the use of such improper means. The loan had three years to run and during that time petitioner would have paid same and lifted the collateral.

It is finally contended by petitioner that out of all fairness, justness and equity, all the facts of this matter should be heard and a decision rendered thereon, and that this can only be done by granting him a new trial where *all* the accumulated evidence can be presented and all the witnesses produced at the trial and, in addition thereto, *that the question of whether state or Federal law should apply herein also be resolved thereby, so that Equal Justice will be done to all.*

A great wrong has been done petitioner and equal justice requires its correction which can only be done by a full new trial of the matter at which all the evidence may be presented at the same time.

Petitioner respectfully prays that this Honorable Court help rectify the great wrong done him by granting him leave to file his Third Petition for Rehearing.

Respectfully submitted,

Harry J. Alker, Jr.

HARRY J. ALKER, JR.,
1505 Land Title Building,
Philadelphia, Pa.,
Petitioner.

ORDER.

AND NOW, , 1964, leave is granted the petitioner to file a Third Petition for Rehearing of the Petitioner's Petition for the Issuance of a Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit in the above entitled case.

By THE COURT:

.....

J.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1963.

No. 342.

FEDERAL DEPOSIT INSURANCE CORPORATION, TO THE USE OF SECRETARY OF BANKING, RECEIVER OF INTEGRITY TRUST COMPANY, TO THE USE OF BUTCHER & SHERRERD, AND FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE,

Respondents.

v.

HARRY J. ALKER, JR. AND MAMIE DuBAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DuBAN, DECEASED.

Petitioner.

THIRD PETITION FOR REHEARING.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Harry J. Alker, Jr., prays that this Court, rehear and reconsider its denial of the petitioner's petition for the issuance of a writ of certiorari to review the action of the Circuit Court of Appeals for the Third Circuit in the above entitled case, and

RESPECTFULLY REPRESENTS

On August 6, 1963, your petitioner filed with your Honorable Court a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit.

On October 21, 1963 your Honorable Court denied the petition for certiorari.

On November 15, 1963, your petitioner filed with your Honorable Court a petition for rehearing, which was denied December 9, 1963. On December 27, 1963, your petitioner filed with your Honorable Court a second petition for leave to file a petition for rehearing which petition for leave was denied March 2, 1964.

The history of the case, questions presented, the statutes and law involved, the specifications of errors, and nearly all the reasons for granting the writ are partly set forth in the petitions for certiorari and briefs in support thereof and the subsequent motion and petition for rehearing, to which reference is made as well as the record and will not be repeated here, they being hereby made part of the record, if they have not already been so made. Additional reasons are set forth herein.

Reference is also made to the record, the various petitions and briefs filed in this matter with your Honorable Court as of October Term, 1945, No. 880, which contain further reasons why the writ should be allowed, and they are made part hereof by way of reference.

The questions and reasons given by petitioner in his Petition for Leave to File a Second Petition for Rehearing are also referred to and incorporated herein by said reference. All of the reasons given in the Third Petition for Leave to File this Third Petition are referred to and incorporated herein as part of this petition.

This is an equitable action. Neither equity nor justice has been done.

Alker had this loan which was taken over by the Integrity Trust Company, an agreement made, Mr. DuBan deposited more stock on certain conditions. In addition to the securities, Alker gave the Federal Deposit Insurance Company insurance, and assigned various fees.

The record shows he kept his part of the agreement meticulously and at great sacrifice. The Federal Deposit

Insurance came into the picture and claimed it was the owner of the obligation. The Bank Examiner testified the Examiners knew about the agreement connected with the loan, and thought it a good one. Alker, after the Federal Deposit Insurance Corporation claimed it owned the note, kept his part meticulously. This took place for several years. Then, suddenly, when there was no default and the loan had several years to go, the Federal Deposit Insurance called the loan and claims it sold the collateral. The National Dairy refused to transfer the DuBan stock as it was advised there was no default. This proceeding was then instituted by the Federal Deposit Insurance Corporation, who claimed it owned the note and there was a default. Alker and National Dairy defended. Alker was incapacitated. When suit was first sought, all the evidence and witnesses were not available. Long litigation followed. Judge Welsh, the trial Judge, finally granted a new trial.

All sorts of proceedings were tried by plaintiffs. First one objection was interposed after another. As, after great difficulty, each one was met, the Court of Appeals sent it back for trial subject to certain conditions after having first refused a new trial and only granting it when its action in interfering was greatly criticized by various law reviews, who felt it should not have interfered but should let Judge Welsh retry the case and the objections, and then come up on appeal. This caused a lot of delay.

All of this is stated so the Court can see why it has taken so long.

As the Courts constantly have stated, time cannot count when equity and justice are involved.

As to the prolongation of the proceeding.

The plaintiffs apparently abandoned their stand that there was no time fixed for the fulfillment of the obligation which they had always taken heretofore inasmuch as witnesses were produced showing first it was five years and then ten years.

They now stress the time the litigation has extended and there must be an end to all litigation.

The Court's attention is called to the difficulty in locating the witnesses and ascertaining who they were; one such witness, John Pellini, was absent in the Army in combat duty for three years. Mr. Santamarie had left this territory and was in the far West. He was finally located and, promptly on his return, his testimony was taken. The records shows that Alker was a sick man for a long time, and unable to work.

This is an equitable proceeding in which justice had not been done, and the many steps show that the proceeding was carried on as fast as it could.

As to definite time for payment of note heretofore claimed by F. D. I. C.—not now claimed.

Heretofore the Federal Deposit Insurance Corporation claimed, and the District Court so found, the agreement was void because it claimed no time limit was fixed. Two disinterested witnesses were later produced—one John Pellini, who had been office manager of petitioner for many years, and who was absent from the country in combat duty in the United States Army for a long time, returned to Philadelphia, and his evidence was taken; to wit, that the Bank officials had notified him they were extending the loan first for five years and they required a life insurance policy for that term on petitioner, and then, at the end of that period, that it was being extended for ten years and must have insurance for that term; that they had him come to the Bank and get the new note, get it signed, and brought back to the Bank. Then Petitioner produced L. J. Santamarie who had moved to California and lived there a long time. He was located and returned to Philadelphia. He was in the life insurance business. The Bank official in charge told him they were making (first) a five year loan and must have a policy for that term to cover. They ordered him to place it, which he did. At the end of that time the Bank

official in charge advised him they were extending the loan for ten more years and must have a new policy for that term; he placed a new policy for the ten years and sent it to the Bank, and the bill to Petitioner. Both witnesses testified they were advised by an officer of the Bank of the definite extensions of Alker's loan.

This eliminated the contention as to definiteness of time of the loan. Neither Federal Deposit Insurance Corporation nor the use plaintiffs have now raised it.

As to time element in discovering the F. D. I. C. agreement with 12 state banks.

It was not until years after the suit was brought that the Federal Deposit Insurance Corporation announced in the newspapers it held the obligation for twelve state banks. This changed the picture as the State Banks would have no standing in the Federal Court. It came as a great surprise. It was a clear misrepresentation as it had always claimed it was the owner. The Federal Deposit Insurance Corporation tried to take advantage of this.

The Third Circuit Court of Appeals had recently decided in *Publicker v. Shallcross*, 106 F. 2d 949, that where there has been fraud or misrepresentation, time did not enter a matter, but it opened the matter anew. This would be true as to the present suit. As stated, the Federal Deposit Insurance Corporation had always claimed it had taken an assignment of Alker's obligation and owned the same.

Time therefore was out of the question in this equitable action.

As to DuBan.

The record clearly shows that when Mr. DuBan deposited with the loan the last 1,000 shares of National Dairy Products Corporation common stock, he did so on condition that the loan should be extended and Alker's securities should be held until the Bank gets its debt, DuBan's securities were returned to him and Alker's situa-

tion was worked out. He would not leave the stock until the Bank agreed to it. The Bank agreed to it. The record shows this; no one disputed it. The Federal Deposit Insurance Corporation alleges it sold the collateral. It did so when there was no default. The plaintiffs should not be permitted to keep the proceeds of DuBan's stock if it broke the agreement. His stock, or whatever represents it, should be returned to him. It had no authority from him to sell the stock under the circumstances.

As to one-year rule.

The first Motion for a new trial was filed within the proper time and within the required terms, was timely filed, and that his subsequent motions for a new trial referred to and incorporated in these said provisions of the first motion, and therefore a one-year rule should not restrict the appellant in this instant case.

As to fraud.

The Court below found there was no fraud.

As to affidavits by Bank Examiners as to Knowledge of Agreement by Examiners, Discussion of same with officers of Bank, other examiners.

The State Bank examiner who examined the Bank with a Federal Bank Examiner and Federal Deposit Insurance Examiner, made three affidavits—the first in the office of the late Justice Owen J. Roberts (p. 47a) and then more affidavits, all of which are in the record. He testified that the executive officers of the Bank confirmed to the examiners that the agreement as to the Alker loan existed and the provisions thereof. They advised Examiners that Alker was living up to his agreement scrupulously and that the Bank therefore had to live up to it.

He testified the Examiner for the Federal Reserve Bank was present in 1937, 1938 and 1939, and the Examiner for the Federal Deposit Insurance Corporation was present

in 1939. He testified it was good business for the Bank to make such an agreement.

He testified nothing was done that could be construed to deceive, or be designed to deceive, the creditors or the public authority, on which the Federal Deposit Insurance Corporation relied in insuring the Integrity Trust Company, was or was likely to be misled. He testified the executive officers of the Bank confirmed to the Examiners that the agreement did exist, and the terms of the agreement, that nothing was done that could be construed to deceive or be designed to deceive, the creditors or the public authority, or would tend to have that effect; that there was no undisclosed or fraudulent arrangement. See Matsinger affidavit, Page 23.

The *D'Oench Duhme* case does not therefore apply.

See letter of Justice Roberts, Page 26.

As to Alker's execution of agreement terms.

The record shows the Federal Deposit Insurance Company admitted there was no default by Alker; the interest paid, the insurance maintained, the assigned fees as received paid. The record shows it also held the insurance as testified to.

Alker claims the alleged sale was illegal as the loan had several years to run and there was no default. Since then petitioner has learned the use plaintiffs a few years ago cashed the insurance and have received, according to the insurance company, $36,900.

As to the F. D. I. C. lending the Integrity Bank an amount greatly in excess of the insured accounts.

Testimony of S. Herman Hall, Liquidating Officer of F. D. I. C.

Page 81(a) Notes of Testimony:

"Q. Where a deposit was for more than $5,000.00 they didn't pay over that amount—they only paid up to that amount?

A. They paid all deposits regardless of amounts.

Q. They did pay all deposits?

A. A million dollars as well as five thousand dollars.

Q. The Federal Deposit Insurance Corporation did?

A. They did.'"

As to misconstruction by Judge Layton of orders of Court of Appeals.

In authorizing the new trial by the Court of Appeals the Court intended the Trial Judge to consider new evidence. Judge Layton misconstrued that and restricted petitioner to witnesses who had not testified before. There were witnesses who had testified before but who had additional evidence not theretofore given but important to a right decision of the case. This makes it important that a new trial be granted at which the parties may have *all* their witnesses present who will give all the evidence then at one hearing and the Judge will have all the facts. This is vital and Judge Layton's action was a serious error.

Apropos of our averment that Judge Layton erred by misinterpretation of Rule 60(b), attention is directed to his *error of omission* which could have been inadvertent, but is more apt to have been designed. In his opinion (p. 16a of petitioner's C. C. A. brief), Judge Layton correctly quotes Rule 60(b) in toto and verbatim. But when he tries to dispose of petitioner's new trial motion by process of elimination, the learned jurist deliberately omits the *cogently pertinent* part of Rule 60(b)(5), and quickly skips to the inapplicable generalities of 60(b)(6).

More precisely, subdivision (5) of Rule 60 shows that the *one-year limitation on* filing motions for a new trial *does not apply* when "(5) the judgment has been satisfied, released, or discharged, or a prior judgment . . . has been reversed or otherwise vacated, or *it is no longer equitable that the judgment should have prospective application.*"

When, however, Judge Layton came to discuss clauses 4, 5, and 6 of Rule 60(b)—(Vide p. 17a of petitioner's C. C. A. brief) he hurried over clause (5), as follows:

> "Defendants have offered no evidence to prove that the judgment is void (clause 4), or that the judgment has been discharged, or satisfied (clause 5). The inquiry is thus greatly narrowed."

Note well, if you please, that he, Judge Layton, is the one who *thus straitened it*, and *not* Rule 60(b)(5). His Honor, Judge Layton, *refrained* from even mentioning his *most germane reason* stated in said clause 5, viz.:

> *"or it is no longer equitable that the judgment should have prospective application . . . ."*

Yet, *this is exactly the reason given by the trial judge*, Hon. George A. Welsh, for his granting a new trial to defendant-petitioner in his opinion, dated November 3, 1955 (pp. 13a, 14a of C. C. A. brief), wherein he said:

> "In our judgment *justice and equity require that defendant*, Alker, *have an opportunity to submit this type of evidence* so that any facts elucidated may be embodied in the findings of fact and conclusions of law in any opinion subsequently filed in the case. The discretion and latitude allowed a trial judge . . . must . . . be exercised . . . *with a conscientious feeling as Chancellor that these additional witnesses should be heard . . . at a new trial* . . . ." (Emphasis ours.)

Thus was it brought squarely within that *pertinently cogent phrase* of clause 5, Rule 60(b) which his Honor, Judge Layton, so conveniently avoided. Hence we strenuously urge that the learned substitute, Judge Layton, gravely erred in his zeal to vindicate the prior errors of the learned Court of Appeals (in issuing mandamus and prohibition which they later vacated) by specifically skipping

the apposite phrase of clause 5, and hastening to assure the legal world that clause 6 of Rule 60(b) did not warrant a new trial for the petitioner. Judge Welsh had granted said new trial under clause 5 of Rule 60(b), and it is respectfully insisted that the gross error of his Honor, Judge Layton, was merely compounded further on the affirmance thereof entered by the learned Court of Appeals below. The only method for the correction of these grave errors, which so obviously affect the proper interpretation of Rule 60(b), F. R. C. P., on a nation-wide scale, is by issuance of the Certiorari from this Honorable Supreme Court as prayed for herein.

As to Fidelity-Philadelphia Trust Company, Use Plaintiffs.

Inasmuch as the record clearly shows that Mr. William P. Gest, President of the Fidelity-Philadelphia Trust Company, was chairman of the Executive Committee of the Integrity Trust Company; that the matter of the Alker loan came regularly before the said Executive Committee, that Mr. Gest, who knew Alker, frequently asked whether Mr. Alker was keeping his part, and, when advised that Alker was, the record shows Mr. Gest said if Alker was, the Integrity must. This is an equity case. In view of Mr. Gest's connection with both companies and his familiarity with the whole transaction, the Fidelity Trust Company is estopped from claiming the agreement was illegal and not binding and therefore its claim should be dismissed.

Was the F. D. I. C. bound by the terms of the loan by the Integrity Trust Co., of which loan it became assignee? The Court should pass on this important question which has not been passed on in this case, and is a vital one.

If there ever was a case in which equity and justice required that Alker and the DuBan Estate be granted a new trial, this is it.

The Court should grant a certiorari and pass on this question, or it should refer the matter back to the District Court for a retrial at which all the witnesses and evidence should be presented, and in which Judge Welsh who knew the case from the start could at least sit in.

The matter is one of public importance.

CONCLUSION:

It is contended by the Appellant that he has a meritorious defense to the action against him and that he has clearly established misrepresentation and fraud and a great injustice and wrong has been done. Therefore, the relief requested by him should be granted by this Honorable Court and the judgment set aside, the case reopened, a full trial given him where all the witnesses may be in Court together and testify to all of the facts of which they now have knowledge, irrespective of whether they testified heretofore or not, at which time the validity of the alleged cancellation by the Federal Deposit Insurance Corporation of his loan may be decided as well as in the event it is decided the alleged cancellation of the Alker loan by the Federal Deposit Insurance Corporation is invalid, then to determine the liability of the Federal Deposit Insurance Corporation arising thereout.

Respectfully submitted,

Harry J. Alker, Jr.

Harry J. Alker, Jr.,
1505 Land Title Bldg.,
Phila. 2, Pa.,
Petitioner.

It is hereby certified that the preceding 3rd petition for Rehearing is presented in good faith and not for delay; and is restricted to the grounds above specified.

Harry J. Alker, Jr.

Harry J. Alker, Jr.,
Petitioner.

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } ss.:

I, C. B. MATSINGER, of 101 West Fifth Avenue, New York City, being duly sworn according to law, deposes and says:

I was a bank examiner for the State of Pennsylvania from November 1, 1929, to November 15, 1943. After that I engaged in the banking business until March 1, 1947, at Easton, Pennsylvania, since which time I have been in business in New York.

While a Pennsylvania state bank examiner, I examined the Integrity Trust Company, a Pennsylvania state banking institution, during the years 1937, 1938 and 1939. My examination was made contemporaneously with and in conjunction with the examination made by the Federal Reserve Bank in 1937 and 1938 and both the Federal Reserve Bank and the Federal Deposit Insurance Corporation in 1939. We examiners worked together in the examination. During the said examination, joint conferences were had by all the examiners with the executive officers of the bank in relation to matters requiring special attention. One of the matters which we discussed with the officers was the loan of Harry J. Alker, Jr., which was the second largest loan in the bank.

The collateral with this loan was rather unusual because it consisted of not only securities belonging to Mr. Alker and those of some friends but also of an insurance policy in the amount of $125,000 on the life of Mr. Alker, payable to the Trust Company together with an assignment of certain large legal fees due to him from the Commonwealth of Pennsylvania. The very presence of this unusual type of collateral was notice to me that there must be some kind of agreement in existence in connection with the loan, even if the officers had never said anything to me about the agreement. The presence of this unusual col-

lateral was a record by the bank that an agreement existed as to the loan.

But the executive officers of the bank would not let the matter rest and they actually confirmed to the examiners that the agreement did exist with Mr. Alker as to the loan and that the bank had entered into the agreement with Mr. Alker, which provided, among other things, that he should maintain the insurance for the term of the policy which the bank placed and pay over to the bank the assigned fees as received, pay the interest on the loan and reductions as he could. They informed us that there was some question as to the right of the bank to collect fees directly from the (fol. 48) Commonwealth earned by Mr. Alker, as the Commonwealth would not recognize assignments, and by making the agreement with Alker and living up to it the bank was sure it would get the fees, which were substantial. They advised us that Mr. Alker was living up to his agreement scrupulously and that the bank therefore had to live up to its agreement. I remember this very distinctly, as this loan was one of the largest in the Integrity and, as I said before, I examined the Integrity several times. The examiner for the Federal Reserve Bank was present in 1937, 1938, and 1939 and the examiner for the Federal Deposit Insurance Corporation was present in 1939.

I have seen copies of the original notes of Alker of 1931 and in my opinion the notations on these notes clearly refer to the Alker, DuBan agreement and the 1936 note clearly shows by the provision inserted at the bottom, a confirmation and extension of that agreement. These notes with the notations on them together with the unusual collateral for surety were all records of the Integrity Trust Company and showed that there was no secret about the matter.

The Federal Deposit Insurance Corporation made no examinations of the Integrity Trust Company until 1939 when they made a joint examination in connection with the state and Federal Reserve examiners.

In my opinion as a banker and a bank examiner of many years' experience, the presence of said term policy and the assignment of fees, together with various other collateral in other peoples' names, accompanied by powers to pledge constituted a record of the bank that such an agreement existed.

In my opinion, it was, furthermore, good business for the bank to make such an agreement. By the agreement the Integrity got a considerable amount of collateral and protection, all of which operated to the benefit of the bank and the public as well as the Federal Deposit Insurance Corporation. In my opinion nothing was done here that could be construed to deceive, or be designed to deceive, the creditors or the public authority, or would tend to have that effect.

There was no undisclosed or fraudulent arrangement. The records of the Integrity Trust Company clearly showed there was no misrepresentation or misstatement as to the Alker loan which was an asset in the portfolio of the Integrity Trust Company. The note was not designed to deceive the creditors or the public authority and would not tend to have that effect. There was no scheme or arrangement (fol. 49) whereby the banking authority, on which the Federal Deposit Insurance Corporation relied in insuring the Integrity Trust Company, was or was likely to be misled.

(Sgd.) C. B. MATSINGER.

Sworn to and subscribed before me this 9th day of August, A. D. 1949.

(Sgd.) J. J. BUCHANAN,
Notary Public.
My commission expires Feb. 1, 1953.

(Seal)

OWEN J. ROBERTS
1510 Morris Building
Philadelphia 2, Pa.
RIttenhouse 6-0650

November 30, 1950

Hon. D. Emmert Brumbaugh
Secretary of Banking
Harrisburg, Pennsylvania

Dear Mr. Brumbaugh:

Sometime ago Harry Alker consulted me about the action in the United States Court by the Federal Deposit Insurance Corporation against him and the DuBan Estate.

At that time the Circuit Court of Appeals had held the agreement made by Alker and DuBan with the Integrity Trust Company was not binding on the Federal Deposit Insurance Corporation, basing its opinion on the case of Federal Deposit Insurance Corporation vs. D'Oench, Duhme & Co., Inc., 315 U. S. 447, which was a fraud case, and citing a criminal section of the Federal Reserve Act. The District Court had held in the Alker-DuBan case there was absolutely no fraud.

I advised Harry that in my opinion the D'Oench, Duhme decision and the Criminal Section of the Federal Reserve Act were never intended to apply to anything but a fraud case and that therefore I was of the opinion he was entitled to a new trial. I thought a great wrong had been done him in the matter because there was no default in interest, Harry having completely performed his part of the agreement in all respects, which agreement the F. D. I. C. had adhered to for almost three years.

I have not changed my mind in this respect and am still of the opinion that a new trial should be granted him.

I understand the Attorney General's office and you have gone into the matter and you likewise feel that this should be done.

I therefore hope you will see your way clear to consent to it.

Yours sincerely,

OWEN J. ROBERTS

OJR:Sy